82-1769

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LAKEWOOD, OHIO CONGREGATION OF JEHOVAH'S WITNESSES, INC.,
Petitioner,

v.

CITY OF LAKEWOOD, OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a municipal zoning ordinance excluding churches as a permitted use in nearly 90% of its area, including all of its single-family residential districts, bears a substantial relation to the public health, safety, morals or general welfare.

II. Whether a municipal zoning ordinance excluding churches as a permitted use in nearly 90% of a city, including all of its single-family residential districts, infringes upon a religious congregation's First Amendment right to free exercise of religion, where the building of the congregation's church in that city is thereby effectively prohibited.

III. Whether the Court of Appeals erred in refusing to apply the strict scrutiny test to determine the constitutionality of a municipal zoning ordinance which excludes churches from nearly 90% of a city, including all of its single-family residential districts, because that ordinance did not, in the court's view, infringe upon practices related to "fundamental tenets" or "cardinal principles" of religious belief.

IV. Whether the Court of Appeals erred in refusing to apply the strict scrutiny test to determine the constitutionality of a municipal ordinance which, in the court's view, imposes only an "indirect" burden on the right of free exercise of religion.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio,* is reported at 699 F.2d 303 (1983), and is set forth in Appendix A. The decision of the United States District Court for the Northern District of Ohio, being Case No. C80-1939, which has not been reported, is set forth in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The ordinance challenged by Petitioner is Chapter 1107, being a portion of Part Eleven of the Codified

Ordinances of the City of Lakewood, Ohio, and relevant portions thereof are set forth in Appendix C. Petitioner's challenge is based on the First and Fourteenth Amendments to the United States Constitution, which are also set forth in Appendix C.

STATEMENT OF THE CASE

This petition seeks review of the decision of the United States Court of Appeals for the Sixth Circuit, upholding a municipal zoning ordinance which prohibits churches in almost 90% of the area of the municipality, including all single-family residential districts. *Lakewood, Ohio, Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio,* 699 F.2d 303 (6th Cir. 1983). Not only is this the first—and only—federal case determining the extent to which municipalities may enact zoning ordinances to exclude churches, but it also effectively overrules the law of seven states in which courts have reached conclusions directly opposite to that reached by the Sixth Circuit.

Petitioner respectfully submits that the appellate court's decision is erroneous by reason of its misinterpretation of this Court's holding in *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640 (1981), and its failure to apply the "strict scrutiny" test mandated by this Court in *U.S. v. Lee,* 50 U.S.L.W. 4201, —— U.S. —— (1982); *Thomas v. Review Board of Indiana Employment Security Div.,* 450 U.S. 707 (1981); *McDaniel v. Paty,* 435 U.S. 618 (1978); *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Gillette v. U.S.,* 401 U.S. 437 (1971); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Torcaso v. Watkins,* 367 U.S. 488 (1961); and *Cantwell v. Connecticut,* 310 U.S. 296 (1940). Moreover, and perhaps more importantly, the two courts below have now fashioned their own answer to the question held in abeyance by this Court 57 years ago when it decided *Euclid v. Ambler Realty Co.,* 272 U.S. 365

(1926): whether municipalities may constitutionally enact zoning ordinances which exclude places of public worship from some or all of the municipality. The more specific issue raised herein is whether municipalities may constitutionally exclude churches from residential areas. However, the larger issue exists as to whether municipalities may constitutionally exclude churches from any zoning district, without demonstrating a compelling governmental interest which outweighs the First Amendment guarantees and which may not be served by any less intrusive means. Petitioner submits that it is now imperative for this Court to answer the question left open in *Euclid* over a half-century ago, and accordingly urges this Court to grant the within petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioner Congregation (the "Congregation") is a non-profit Ohio corporation whose members are Jehovah's Witnesses. Respondent City of Lakewood, Ohio (the "City"), a suburb of Cleveland, Ohio, has a population of about 62,000 and an area of about 5.5 square miles. Its area is fully developed, leaving few vacant lots. Since 1944, the Congregation has occupied a converted storefront on one of two commercial streets in the City. The Congregation determined that its growth was restricted because the storefront was too small, had parking for only eight cars and was situated in a commercial area inappropriate for a church. Unable to accommodate its current members, and failing in its theocratically-required efforts to expand its membership because of the unsuitable location and appearance of its Kingdom Hall, the Congregation acquired the only site available in an area which it believed appropriate for a place of worship.[1]

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[1] The Congregation paid $25,000.00 for the site. Two other sites were rejected because they were in commercial areas and were priced at $90,000.00 and $250,000.00, respectively. There were no other available sites.

In 1972, it purchased a lot, approximately one-half acre in size, located at the intersection of Clifton Boulevard, six lanes wide, and West Clifton Boulevard, five lanes wide. The site was zoned for single-family use, but could be used for a church upon issuance by the City's Board of Zoning Appeals of a special exception. The Board refused to grant the Congregation's 1972 application for a special exception because of a temporary traffic problem brought about by neighborhood bridge repair; because the construction of the church would remove the property from the City's tax base; because such use might result in a possible property devaluation; and because a very small part of the Congregation lived within a half mile of the site. As one member of the Board stated, "[T]he neighborhood should have something to say about what is established in their area, particularly something that will not be of use to the people." In 1973, before the bridge repairs were completed, the City amended its ordinances to totally prohibit the construction of churches in the district in which the site was located. At that time there was only one available vacant lot of sufficient size located in a residential area: the one owned by the Congregation. Thus, the only actual effect of the amended ordinance was to prohibit *this* Congregation from building on *this* property.

The amended ordinance, which is here challenged, reclassified the Congregation's property as "R-2," which is the single largest zoning district in the City, containing more than 50% of its land area. Churches are banned in the R-2 District, and no special exception is available to permit churches to be located in that district. While uses in the R-2 District are ostensibly limited to single-family residences, eight public schools, including all of the City's middle schools and its high school, and a private school are all located therein, presumably as non-conforming uses. The challenged

ordinance, as further amended in 1976, prohibits the building of churches in 90% of the area of the municipality. The remaining 10% is zoned for apartment houses, commercial and industrial uses. Although the ordinance, when enacted, only impinged upon the rights of the Congregation, it, in fact, effects a continuing denial of the right of any religious organization to erect a place of worship in 90% of the City. Having limited apartment houses, commercial and industrial uses to a small area, the City has thereby artificially inflated the value of the property located therein. By confining construction of churches to the most expensive property, the City has effectively prevented any new church from entering the City.

The Congregation challenged the ordinance in the United States District Court by filing a Complaint pursuant to 42 U.S.C. §1983 alleging, in substance, that the effect of the ordinance is to prohibit the Congregation's free exercise of religion in the City. The Congregation argued below that the exclusion of churches did not bear a substantial relation to the health, safety, morals or general welfare of the City, and thus, if the "substantial relation" test in *Euclid* controlled, the challenged ordinance was unconstitutional. It argued further, however, that the challenged ordinance should be subjected to strict scrutiny to insure that it was the least intrusive means of serving a compelling interest of the City. Expert witnesses on both sides agreed that any legitimate objection to churches in residential areas could be readily overcome by application of setbacks, parking, screening, landscaping and other similar regulations.[2] Nonetheless, the trial court gave judgment for the City, relying upon "the broad presumption

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[2] The City's expert witness testified that it was in the City's best interest to require that all new churches be constructed in the "deteriorated" commercial areas of the City in order to aid in their redevelopment.

of validity" accorded zoning enactments by *Euclid*. The trial court refused to apply the strict scrutiny test on the theory that the zoning ordinance prohibiting churches in no way infringed the rights of the Congregation.

The Court of Appeals acknowledged there were burdens on the free exercise of the Congregation's freedom to worship, but still refused to apply the strict scrutiny test. Had the Court of Appeals applied that test, it would have found that the record is barren of any compelling governmental interest justifying the prohibition of churches.

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court Below Abrogates Three Hundred Years of American Tradition and Jurisprudence and Erroneously Overrules the Decisions of Seven State Courts in Holding That Cities May Constitutionally Exclude Churches from Areas Zoned for Residential Use.

The historical background of the First Amendment's guarantee of free exercise of religion compels the conclusion that the decision of the Sixth Circuit ought to be reviewed. The decision below is the *only* federal appeals court decision on this sensitive subject; it essentially overrules the law of numerous states; and it represents so significant a departure from established constitutional principles that review by this Court is *essential* to the preservation of the First Amendment. Unless the decision of the Sixth Circuit is reviewed, it will become a polestar for the legislative bodies of every village, town and city in the United States which seeks some basis for prohibiting activities which this Court has consistently draped in the protective cloak of the First Amendment.

The Sixth Circuit opinion flows from one fundamentally erroneous premise: that the constitutional guarantee of the Free Exercise Clause is unrelated to the setting aside of a place where the right can be exercised in the form of public worship. The central holding of the appeals court is that the Congregation's interest in having a church in which to conduct public worship services is only "tangentially related" to the exercise of First Amendment rights. This holding stands in stark contrast to three hundred years of American tradition and jurisprudence.

More than one hundred years before the ratification of the Constitution, the following statute was contained in the law of New York, which was then a part of the territory granted by King Charles II to his brother James, Duke of York:

> "That no Congregation shall be disturbed in their private meetings in the time of prayer preaching or other divine Service."[3]

Upon the advent of his regency as King James II, the former Duke of York further expounded on the special importance of, and protection to be accorded, the holding by congregations of public religious services. In the Declaration of Indulgence of 1687,[4] King James announced:

> "And to the end that by the liberty hereby granted the peace and security of our government in the practice thereof may not be endangered, we have thought fit, and do hereby straitly charge and

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[3] Sutherland, Arthur E., *Constitutionalism in America, Origin and Evolution of its Fundamental Ideas,* Blaisdell Pub. Co., New York (1st Ed. 1965), p. 280, quoting from *Colonial Laws of New York.*

[4] Gee, Henry & Hardy, W. J., *Documents Illustrative of English Church History,* MacMillan & Co., Ltd., London (1914), p. 641, quoting from Transcr. Patent Roll, 3 James II, part 3, No. 18.

command all our loving subjects, that—*as we do freely give them leave to meet and serve God after their own way and manner, be it in private houses or places purposely hired or built for that use,* so that they take especial care that nothing be preached or taught amongst them, which may any way tend to alienate the hearts of our people from us or our government, *and that their meetings and assemblies be peaceably, openly, and publicly held,* and all persons freely admitted to them, and that they do signify and make known to some one or more of the next justices of the peace what place or places they set apart for those uses, and that all our subjects may enjoy such their religious assemblies with greater assurance and protection - we have thought it requisite, and do hereby command, that no disturbance of any kind be made or given unto them, under pain of our displeasure, and to be further proceeded against with the utmost severity." (Emphasis added.)[5]

The other American colonies, each of which was later to ratify the United States Constitution and the Bill of Rights, made similar provision with regard to the nature of public worship by congregations. Not all went so far as the Carolinas' "Fundamental Constitution" which required: "II. That God is publicly to be worshipped," *Sutherland, op. cit.,* n.3, at 293. However, in

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[5] The Indulgence of James II differed significantly from an earlier Declaration of Indulgence promulgated by his brother Charles II in 1673, which, while providing his subjects with ". . . a sufficient number of places . . . for the use of such as do not conform to the Church of England, to meet and assemble in . . . ", was careful to also assure "that none of our subjects do presume to meet in any place, until such place be allowed and the teacher of that congregation approved by us." Adams, George B. and Stevens, H. Morse, *Select Documents of English Constitutional History,* MacMillan & Co., New York (1918), p. 435, citing *Cobbett's Parliamentary History,* iv. 515.

order to accommodate such mandated public worship, other of the original colonies, including Connecticut, provided congregations with the legal authority to build and repair their "houses for public worship," *Sutherland, op. cit.*, n.3 at 277.

The inexorable conclusions which must be drawn from a review of the historical backdrop to the First Amendment are, in part, these: that the Establishment Clause was intended both to end the colonial practice of levying a tax on all villagers to support ministers and their meeting-houses and to guarantee that no "national" religion would be established,[6] and that public worship in buildings set aside for such purposes was inextricably interwined with the guarantee of free exercise.

State courts, construing the United States Constitution consistent with the precedents established by the English and colonial laws, have recognized in their decisions the deference which has historically been accorded to places of public worship. The vast majority of state courts which have considered the issue affirm the belief that public houses of worship are essential to free exercise of religion in this nation.

Numerous state courts have recognized the danger of excluding churches from any portion of a municipality.[7] These state courts started with the test articulated by this Court in *Euclid*—that an exercise of a municipality's police power must bear a "substantial relation to the public health, safety, morals or general welfare," 272 U.S. at 395 (citations omitted)—and proceeded to

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[6] Thorpe, Francis Newton, *Constitutional History of the United States*, Vol. II (1788-1861), Callaghan Pub., N.Y. (1936), at p. 238; *See Larson v. Valente*, 50 U.S.L.W. 4411, —— U.S. —— (1982) (reviewing the historical background of the Establishment Clause).

[7] *See Ellsworth v. Gercke*, 62 Ariz. 198, 156 P. 2d 242 (1945); *City of Englewood v. Apostolic Christian Church*, 146 Colo. 374, 362 P. 2d 172 (1961); *Church of Christ v. Metropolitan Bd. of Zoning*, 175 Ind. App. 346, 371 N.E. 2d 1331 (1978); *Board of*

find that ordinances excluding churches from residential areas were *inimical* to the general welfare.[8] *State ex rel Synod of Ohio of United Lutheran Church of America v. Joseph, supra,* n.7, decided by the Ohio Supreme Court in 1942, typifies the rationale adopted by these cases:

> "How does the case stand with respect to the protection of public morals and the general welfare? The church in our American society has traditionally occupied the role of both teacher and

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Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, 233 Ind. 83, 117 N.E. 2d 115 (1954); *Congregation Temple Israel v. City of Creve Coeur,* 320 S.W. 2d 451 (Mo. 1959); *Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor,* 38 N.Y. 2d 283, 342 N.E. 2d 534 (1975), *cert. den.,* 426 U.S. 950 (1976); *State ex rel Synod of Ohio of United Lutheran Church in America v. Joseph,* 139 Ohio St. 229, 39 N.E. 2d 515 (1942); *City of Sherman v. Simms,* 143 Tex. 115, 183 S.W. 2d 415 (1944). See also *Mooney v. Orchard Lake,* 333 Mich. 389, 53 N.W. 2d 308 (1952). *Cf. State ex rel Lake Drive Baptist Church v. Bayside Board of Trustees,* 12 Wis. 2d 585, 108 N.W. 2d 288 (1961) (while ordinance excluding churches from one of four zoning districts upheld against First Amendment challenge, court recognized the applicability of the "undue infringement" test and that

> "There must be many circumstances under which a religious group could demonstrate that an exclusion from a particular area would be a substantial burden," 12 Wis. 2d at 596.)

Contra, Corporation of Presiding Bishops of Church of Jesus Christ of Latter-Day Saints v. Porterville, 90 Cal. App. 2d 656, 203 P. 2d 823 (1949), *app. dism'd.* 338 U.S. 805 (1949), *reh den.* 338 U.S. 939 (1950) (*quaere* whether overruled by *Santa Barbara v. Adamson,* 37 Cal. 3d 123 [1980]); and *Miami Beach United Lutheran Church of the Epiphany v. Miami Beach,* 82 So. 2d 880 (Fla. 1955).

[8] Contemporary commentators are in accord with respect to the proper characterization of this majority view:

> "Most courts hold that exclusion of religious structures from residential zones is an abridgement of the constitutional right to the free exercise of religion. According to these courts, a violation of this fundamental freedom cannot be justified by such factors as potential traffic hazards, effect on property

> guardian of morals. Restrictions against churches could therefore scarcely be predicated upon a purpose to protect public morals. Over the generations we have seen American churches in the quiet, dignified surroundings of residential districts readily accessible to the members of the congregation . . . Fully to accomplish its great religious and social function, the church should be integrated into the home life of the community which it serves. Churches in fitting surroundings are an inspiration to their members and to the general public. If located in the residential district—space, perspective, greenswards and trees aid in setting off the building and thereby increasing its inspiration. *To require that churches be banished to the business district, crowded alongside filling stations and grocery stores, is clearly not to be justified on the score of promoting the general welfare." Id.* at 248-49, 39 N.E. 2d at 524. (Emphasis added.)

The Supreme Court of Texas agreed with the Ohio court, stating as follows in *City of Sherman v. Simms, supra,* n.7, 143 Tex. at 416-17:

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values, noise, and decreased enjoyment of neighboring properties." Rohan, *Zoning and Land Use Controls,* 1978 and Supp. 1981, §3.05[4][a].

"The majority view is that facilities for religious or educational uses are, by their very nature, 'clearly in furtherance of the public morals and general welfare' and may not be excluded from a residence district in which location of such use is sought." Rathkopf, *The Law of Zoning and Planning,* 4th Ed. 1981, §20.01[2][a].

"The wide majority of courts hold that religious uses may not be excluded from residential districts. As religious uses contribute to the general welfare of the community, and can contribute most when located in residential districts, an ordinance which excludes such uses from residential zones does not further the public health, safety, morals, or general welfare." Anderson, *American Law of Zoning* 2d, §12.19.

"With this conclusion all the available authorities seem to agree. It must not be overlooked that the power to establish zones is a police power and its exercise cannot be extended beyond the accomplishment of purposes rightly within the scope of that power. *To exclude churches from residential districts does not promote the health, the safety, the morals or the general welfare of the community, and to relegate them to business and manufacturing districts could conceivably result in imposing a burden upon the free right to worship and, in some instances, in prohibiting altogether the exercise of that right.* An ordinance fraught with that danger will not be enforced." (Emphasis added.)

The New York Court of Appeals considered the traditional views, typified by the decisions of Ohio and Texas, after thirty years of significant societal changes. Its decision in *Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor, supra,* n.7, leaves no doubt as to the continuing vitality of the earlier decisions:

"It has been forcefully argued to us in the case at bar that there is growing support for the view that churches ought to be subject to the same zoning considerations which are permitted to govern applications from other entities. We are aware that much of the support for the desirability of churches in residential areas descends to us from older case law: 'The traditional concept of a small church serving the immediately neighboring community undoubtedly had something to do with the idea that such use was an integral part of community life in "the best and most open localities." ' . . ."

* * *

"In discussing the problems involved in honoring the constitutionally protected rights of religious

> institutions while acknowledging the fact that they do bring traffic in their wake, do impinge on the quiet enjoyment of their immediate neighbors, and do affect the tax base of a town, we held [in *Westchester Reform Temple v. Brown*] [citation omitted]: 'We have not said that considerations of the surrounding area and potential traffic hazards are unrelated to the public health, safety or welfare when religious structures are involved. *We have simply said that they are out-weighed by the constitutional prohibition against the abridgment of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community.* If the community can, consistent with this policy, both comply with the constitutional requirement and, at the same time, avoid or minimize, insofar as practicable, traffic hazards or other potential detriments bearing a substantial relation to the health, safety and welfare of the community, there is no barrier to its doing so. *Nevertheless, we have already decided in the* Rochester *case that, where an irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former.' " Id.,* 38 N.Y. 2d at 287-88. (Emphasis added.)

The Sixth Circuit not only strips churches of their protected status under the Constitution, but also disregards the societal status which they have traditionally enjoyed in the community.[9] Its decision essentially banishes churches to areas where they will be flanked by filling stations and factories, instead of the "greenswards and trees" which have been their traditional

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[9] Petitioner finds it of particular curiosity, given the position taken by the City in this case, that the City's official seal, adopted in Sec. 105.01 of the Administrative Code of the City of Lakewood,

settings and, most importantly, isolates them from the people whose spiritual needs they seek to serve. The Sixth Circuit itself recognized that its holding was contrary to those of the seven state courts cited, *supra,* n.7. The Sixth Circuit nonetheless disposed of those state cases in a mere footnote, appending thereto the inexplicable conclusion that the "original rationale for permitting churches in residential areas fails." 699 F. 2d at 304, n.2 (Pet. App. 2a). The court's rejection of the state court cases was premised on a misreading of *Heffron, supra.*[10] *Heffron* nowhere touches upon the proposition that allowing churches in residential areas violates the Establishment Clause of the First Amendment.[11] By misapplying *Heffron,* the Sixth Circuit in effect overruled the state courts on an erroneous basis.

Should the decision below stand unreviewed, it will be tantamount to a ruling by this Court that churches are properly confined to only so much geographical area, *if any,* as the zoning authority may deign to permit. In the instant case, the City prohibits the construction of churches save in that small portion of the City devoted to apartment buildings, commercial and industrial uses. Under the reasoning of the Sixth Circuit, churches

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consists "of a shield in the form of a circle, *in the center of which is a group of homes surrounding a church.*" (Emphasis added.) This certainly suggests that the City, like thousands of others in this country, has historically accorded churches—and the buildings which house them—a central place in the community.

[10] Of course, this Court focused in *Heffron* on the unique, limited nature of the public forum involved, a 12-day State Fair at which 1,600,000 visitors were expected. This Court found that the challenged rule prohibiting peripatetic solicitation was justified in order to preserve public order and safety on the premises. *See* 452 U.S. at 654.

[11] This Court's review of the Sixth Circuit opinion may also present an opportunity to resolve what Justice Rehnquist has referred to as the "tension" between the Establishment and Free Exercise Clauses of the First Amendment. *See Thomas, supra,* 450 U.S. at 722 (Rehnquist, J., dissenting).

would not even have the protection now accorded under the First Amendment to nude dancing, *see Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981), and adult theaters, *see Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976). Should that circumstance now come to pass, how hollow would be the words of Justice Stewart, written just two decades ago, concurring in *Sherbert, supra,* 374 U.S. at 413, 415-16:

> "I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause. . . . And I think that the guarantee of religious freedom embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, *I think our constitution commands the positive protection by government of religious freedom—not only for the minority, however small—not only for the majority, however large—but for each of us."* (Emphasis added.)

II

The Court Below Erred in Failing to Recognize That the Challenged Ordinance Directly Infringed Upon the Congregation's Rights Protected by the First Amendment by Precluding Public Worship in 90% of the City, Including All of Its Single-Family Residence Areas.

The Sixth Circuit erred in failing to recognize that First Amendment rights are infringed by an ordinance which prohibits the use of land for public worship. Specifically, the Court held that the challenged ordinance "prohibited the purely secular act of building anything other than a home in a residential district,"

699 F.2d at 307. (Pet. App. 8a.) In so holding, the appellate court said that the building of a church is a secular activity which bears no relation to the Congregation's "religious observances."

The Sixth Circuit's reasoning is fundamentally flawed, because it has misapprehended the purpose and effect of the challenged ordinance. The ordinance regulates not the construction of the physical structure, but the use to which the structure is put. It is quite clear that the ordinance would prevent even the setting aside of an existing building located in the R-2 District as a place for regular public worship and would subject the person who did so to penalties.

In concluding that the construction of the church was a "secular" activity, and that the owning of a church was only a "desirable accessory" of worship, the Sixth Circuit ignored the fact that the existence of the building is a prerequisite to the conduct of the protected activity—public worship—and that the ordinance prohibits not the building itself, but its dedication to and use for regular public worship.

It is thus the *use* of the Congregation's property for public worship—clearly a practice protected by the First Amendment—which is in fatal conflict with the restriction imposed by the ordinance; hardly a more direct conflict could be found. Yet that fact somehow escaped the Sixth Circuit, which inexplicably concluded that the ordinance did not infringe upon the Congregation's rights granted by the Free Exercise Clause, finding that:

> "The zoning ordinance does not *prevent* the Congregation from practicing its faith through worship whether the worship be in homes, schools, other churches, or meeting halls throughout the city." 699 F.2d at 307. (Pet. App. 8a.) (Emphasis added.)

However, there was no factual basis for the suggestion

that such alternative arrangements were either available, or, in fact, would be a permitted use under the Zoning Code.

Worship in private homes is certainly not public worship. Similarly, there are very few homes capable of accommodating over one hundred congregants on three occasions each week. The distinctive beliefs of the Jehovah's Witnesses regarding the idolatrous nature of statues, pictures, icons or symbols[11] renders the use of other churches a possibility which is remote at best, if not an entirely repugnant idea. The same objections might be raised in relation to schools or meeting halls. Whether such alternative places of worship would be available at the frequent and regular intervals at which the Congregation publicly worships is also conjectural.

The fundamental right at issue here is that of the Congregation to come together as a body to worship publicly. The actual assembly of the Congregation's membership is an inherent and inseparable part of the individual member's private belief:

> "Congregate the people, the men and the women and the little ones and your alien resident who is within your gates, in order that they may listen and in order that they may learn, as they must fear Jehovah your God and take care to carry out all the words of this law."—Deuteronomy 31:12.

The same logic supporting the Sixth Circuit's finding that building and owning a church is only a "desirable

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[11] *See West Va. State Board of Ed. v. Barnette,* 319 U.S. 624, 629 (1943).

"Renting a Kingdom Hall from a religious organization . . . might indicate to onlookers that there is not the distinct difference between the truth and false religion that we claim there is. It is best to avoid such rental arrangements."—KINGDOM MINISTRY, *Question Box* (July, 1969, p. 4) (Organizational periodical, Watchtower Bible and Tract Society of New York, Inc.).

accessory" of worship so long as alternative meeting sites are available would also support the conclusion that the exclusion of churches from the City altogether is permissible where such nonspecified places of public accommodation exist. But this Court has itself said with respect to the exercise of the cognate First Amendment right of free speech that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State,* 308 U.S. 147, 163 (1939), quoted in *Schad v. Borough of Mt. Ephraim, supra,* 452 U.S. at 76-77. An irreconcilable conflict thus arises between the interests of the Congregation's members in publicly worshipping according to their beliefs and the City's interest in providing quiet residential neighborhoods. This conflict is no less real because some small area of the City remains where the Congregation could theoretically purchase land and build its church. The prohibition on public worship on the Congregation's premises at Clifton and West Clifton Boulevard is a *total* prohibition which is not minimized by the alleged availability of alternative sites.

The New York Court of Appeals, whose decision in *Jewish Reconstructionist Synagogue, supra,* n.7, was disregarded by the Sixth Circuit, resolved such irreconcilable conflicts in favor of the fundamental right to the free exercise of religion:

> " 'We have not said that considerations of the surrounding area and potential traffic hazards are unrelated to the public health, safety or welfare when religious structures are involved. *We have simply said that they are out-weighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community.* If the community can, consistent with this policy, both comply

> with the constitutional requirement and, at the same time, avoid or minimize, insofar as practicable, traffic hazards or other potential detriments bearing a substantial relation to the health, safety and welfare of the community, there is no barrier to its doing so. *Nevertheless, we have already decided in the* Rochester *case that, where an irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former.'* " 38 N.Y. 2d at 287-88. (Emphasis added.)

As zoning ordinances have become more numerous and complex, conflicts between the interests of municipalities in enacting such ordinances and the fundamental rights of citizens affected by them occur with growing frequency. Such ordinances reflect the proper concern of municipalities for the preservation of a hospitable urban environment and natural resources including greenery and open spaces. However, the benefits derived by a city and its citizens from land use planning must never be obtained at the expense of the dilution of fundamental rights guaranteed by the Constitution.

Given the Sixth Circuit's decision and its logical extensions, the Free Exercise Clause is in great jeopardy. If, as here, a municipal zoning ordinance can exclude churches from 90% of the area of a city without even subjecting the ordinance to strict scrutiny, then any interest, however minimal, can be seized upon by a municipality in support of the total exclusion of churches from within its boundaries. For this reason, review by this Court must obtain lest the rights of all citizens to the free exercise of religion, as conceived by the Founding Fathers, be irrevocably subordinated to the whims of municipal zoning authorities.

III

The Sixth Circuit Erred in Limiting the Application of the Strict Scrutiny Test to Only Those Laws Which Infringe Upon Practices Related to Fundamental Tenets or Cardinal Principles of Religious Beliefs.

Although recognizing that religious observances in the form of beliefs are absolutely protected from governmental infringement, the Sixth Circuit nonetheless held that:

> "*Practices* flowing from religious beliefs merit protection when they are shown to be integrally related to the underlying beliefs." 699 F.2d at 306. (Pet. App. 7a.) (Emphasis added.)

According to the Sixth Circuit, prior to making a threshold determination as to the existence of an infringement of the Free Exercise Clause, a court must first inquire into the doctrinal significance of the affected practice:

> "The centrality of the burdened religious observance to the believer's faith influences the determination of an infringement." 699 F.2d at 306. (Pet. App. 7a.)

There is no basis in *any* decision of this Court for this proposition. In fact, recent decisions by this Court hold to the contrary: that a reviewing court should not undertake a catechetic inquiry into religious doctrines in order to determine the reach of the First Amendment protection. In *Thomas v. Review Board of Indiana Employment Security Division, supra,* this Court considered whether a state could constitutionally refuse unemployment benefits to a Jehovah's Witness who quit his employment based upon religious objections to work that aided in the manufacture of military tanks. The opinion by Chief Justice Burger, in which eight members of this Court joined, stated:

> "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection." *Thomas, supra,* 450 U.S. at 714. (Footnote omitted.)

This Court reaffirmed its reluctance to engage in interpretations of religious faith in *United States v. Lee, supra,* and therefore accepted the appellee's contention in that case that his payment and receipt of Social Security benefits was forbidden by the Amish faith:

> "It is not within 'the judicial function and judicial competence,' however, to determine whether appellee or the government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.' *Thomas v. Review Board of Indiana Employment Security,* 101 S. Ct. 1425, 1431 (1981)." *United States v. Lee, supra,* 50 U.S.L.W. 4201, at 4203.

The examination by the Sixth Circuit of the "centrality" of the construction of a church to the beliefs of the Jehovah's Witnesses flies in the face of the proscriptions of this Court in *Thomas* and *Lee* against any such inquiries into religious doctrines. Additionally, such judicial inquiries, if undertaken in future zoning cases, may well lead to inconsistent results depending upon whether a court finds that the erection of a church is more important to some religions than to others. For instance, the Sixth Circuit decision leaves open to conjecture whether the City's ordinance would be valid as to a Catholic congregation seeking to build a church as a repository for its Eucharist, or a Jewish congrega-

tion seeking to build a synagogue as a repository for the Torah.[12]

The essence of the Sixth Circuit's error is that it wrongly focused on the *construction* of the church as a religious practice, and thereupon concluded that such construction was not central to the beliefs of the Congregation. Had it understood not only the effect of the ordinance but the fact that the practice for which protection was sought was *public worship,* it could only have concluded that the ordinance infringed upon a religious practice. It matters not whether the practice is a "fundamental tenet" or a "cardinal principle." The simple fact that a conflict existed between the ordinance and the religious practice of the Congregation required the Sixth Circuit to subject the ordinance to strict scrutiny.

Unless this Court reviews the opinion below, the application of the strict scrutiny test will be drastically circumscribed by the Sixth Circuit's new prerequisite to the application of that test: that the religious practice for which First Amendment protection is sought must be either a "cardinal principle" or a "fundamental tenet." This is in irreconcilable conflict with the admonition of *Thomas* and *Lee* that courts avoid inquisitions into the doctrinal bases of religions. Once it appears that there is a religious practice at stake, as was clearly demonstrated in the trial court, no inquiry into the relative importance of that particular practice in

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[12] The Sixth Circuit conceded that the City "has drawn broad lines" in the challenged ordinance. 699 F.2d at 309 (Pet. App. 12a.) Given that the ordinance is also vulnerable by reason of its overbreadth, it is evident that this Court's decision in *Village of Schaumburg v. Citizens For A Better Environment,* 444 U.S. 620 (1980), sanctions an assertion by the Congregation herein that the First Amendment rights of other parties not before the Court are also being abridged.

comparison with other religious practices is permissible.

IV

The Sixth Circuit Erred in Holding That Indirect Burdens on the Free Exercise of Religion Are Not an Infringement of Fundamental Rights Requiring Application of the Strict Scrutiny Test.

According to the standards devised by the Sixth Circuit, a zoning ordinance can be said to infringe upon the First Amendment Free Exercise Clause only when it imposes a direct burden upon a fundamental tenet or cardinal principle of a religion. The court held that a zoning ordinance which imposes an indirect burden upon the free exercise of religion does not infringe on First Amendment rights. 699 F.2d at 307 (Pet. App. 8a.) Morever, under the Sixth Circuit decision, the imposition of such an "indirect burden" does not even require a demonstration of a compelling state interest which could not be achieved by less intrusive means.

The Sixth Circuit made a finding that:

> "The burdens imposed on the congregation by the ordinance are an indirect financial burden and a subjective aesthetic burden." 699 F.2d at 307 (Pet. App. 8a.)

However, despite this specific finding that the zoning ordinance imposed such a burden on the Congregation, the court nonetheless held:

> "The answer to the threshold question is that there is no infringement of religious freedom." 699 F.2d at 308 (Pet. App. 10a.)

Contrary to the holding of the Sixth Circuit, this Court has consistently held that *any* burden upon rights secured by the Free Exercise Clause requires a demonstration that the infringement is justified by a

compelling state interest which cannot be served by less intrusive means. This Court has stated:

> "If the purpose or effect of a law is to impede the observance of one or all religions or as to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Braunfeld v. Brown,* 366 U.S. 599, 607 (1961).
>
> "The state may justify any inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that '[the] essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.' *Wisconsin v. Yoder, supra,* at 215, 32 L.Ed. 2d 15, 92 S.Ct. 1526." *Thomas, supra,* 450 U.S. at 718.

and:

> "As our cases have long noted, once a governmental regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest in the absence of less intrusive alternatives." *Heffron, supra,* 452 U.S. 640 at 658 (1981) (Brennan, J., concurring).

The Sixth Circuit opinion relied upon this Court's decision in *Braunfeld, supra,* for its holding that an ordinance which merely makes the practice of religion more expensive is not an unconstitutional infringement. That reliance is misplaced, for the Sixth Circuit opinion contradicts the explicit language of the *Braunfeld* opinion: "Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification." *Braunfeld, supra,* 366 U.S. at

607. The analysis utilized by the trial court and approved by the Sixth Circuit varies from *Braunfeld* in that neither court below made any inquiry as to whether the objectives of the City could be achieved by less intrusive means. In contrast, that inquiry was made by both the trial court and the Court of Appeals as well as this Court in *Braunfeld,* and in fact, the last two pages of the Court's opinion in *Braunfeld* are devoted to an examination of a proposal for a less intrusive means of achieving the objectives of the Sunday closing law challenged in that case, 366 U.S. at 608-09.[13]

The Sixth Circuit found that the Congregation's freedom to worship is only "tangentially related" to worshipping in its own structure. Even assuming, *arguendo,* that the court's description of the relationship as being "tangential" is accurate, a "tangential" relationship is nonetheless sufficient to require an inquiry as to whether the zoning ordinance is the least intrusive means by which the City could achieve its zoning objectives. By failing to require the trial court to so inquire, the Sixth Circuit disregarded this Court's mandate in *Braunfeld.*

In the 57 years since it decided *Euclid,* this Court has handed down numerous decisions describing the permissible exercises of the police power when the use of that power conflicts with rights protected under the Free Exercise Clause of the First Amendment. When such a conflict exists, this Court has refused to accord a presumption of constitutional validity to such exercises of the police power. In such circumstances it has required a showing that a compelling governmental

[13] Similarly, the record in the trial court in this case is replete with expert testimony relating to alternative, less intrusive means by which the City of Lakewood might achieve its stated objective of preserving the character of its residential neighborhoods by setback, side yard, parking, screening, landscaping and other similar regulations.

interest is served by a regulation which affects the First Amendment right of free exercise of religion. This principle was succinctly stated in *Cantwell, supra:*

> "In every case, the power to regulate must be so exercised as not, in attaining a permissible end, *unduly to infringe* the protected freedom." 310 U.S. at 303-04. (Footnotes omitted.) (Emphasis added.)

This Court, in decisions since *Cantwell,* has explicitly and consistently recognized the overriding importance of rights protected by the First Amendment, holding that an otherwise legitimate exercise of the police power which burdens those rights *either directly or indirectly* will not be allowed to stand when less intrusive means might achieve the same objective.

As this Court stated in *Yoder, supra,* 406 U.S. at 215:

> "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

This Court has applied the same standards in cases based upon infringements of the First Amendment guarantee of freedom of expression. These cases have uniformly held that laws or regulations which have even *incidental* or *minimal* impact upon First Amendment rights must be justified by a demonstration of two things: the existence of a compelling state interest and an absence of a less intrusive means of achieving the same governmental objectives.

> "Even where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases, we have scrutinized the governmental interest furthered by the regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on

freedom of expression. *See United States v. O'Brien,* 391 U.S. 367 (1968)." *Schad v. Borough of Mt. Ephraim,* 452 U.S. at 70, n.7.

". . . A governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, 'if it is within the constitutional power of the government; if it furthers an important or substantial or governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest.' " *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 at 79-80, (1976) (Powell, J., concurring), *citing United States v. O'Brien,* 391 U.S. 367 (1968).

The Sixth Circuit opinion eviscerates the Free Exercise Clause of the First Amendment. Under the Sixth Circuit standard, a zoning ordinance regulating the use of land for religious purposes infringes upon the Free Exercise Clause only if it:

". . . exclude[s] the exercise of a first amendment right, religious worship, from the City." 699 F. 2d at 307 (Pet. App. 9a.)

or:

". . . pressure[s] the Congregation to abandon its religious beliefs through financial or criminal penalties." 699 F.2d at 307 (Pet. App. 9a.)[14]

[14] Where a violation of a zoning ordinance is found, Section 1129.99 of the Lakewood Zoning Code in fact provides criminal sanctions and a $500.00 fine for each day that the violation continues. The Sixth Circuit nonetheless concluded that "no pressure is placed on the Congregation to abandon its beliefs and observances," in the same breath as it acknowledged that the Congregation would in fact be subject to the penalty provided in Section 1129.99. 699 F.2d at 307 (Pet. App. 8a.)

Under the Sixth Circuit's holding, only a complete exclusion or prohibition of religious practice would require strict judicial scrutiny. Under this analysis, a city has no obligation to justify an ordinance affecting religious practice short of exclusion or prohibition.

Unless this Court reviews the opinion of the Sixth Circuit, it will lend its imprimatur to a method of analysis which differs substantially from that which it has historically applied in all cases previously decided touching on the subject of regulation of First Amendment rights. The scope of protection afforded by the Free Exercise Clause has been significantly narrowed by the Sixth Circuit in a decision which cries out for review by this Court.

CONCLUSION

The definitive articulation of the relationship between the power to zone and the right of free exercise of religion ought to be made by only one body: this Court. Although the Sixth Circuit found otherwise, the Congregation believes that while municipalities may *regulate* the use of private property for public worship, they may *not,* by zoning ordinance, constitutionally *exclude* churches without a compelling reason to do so which cannot be served by any less intrusive means. If such is not the law, then this Court, as the ultimate authority on the Constitution, is the court to so declare.

The decision of the court below binds all federal courts in the Sixth Circuit. Because the Sixth Circuit decision is the only federal appeals court decision on this issue, it will also be given great deference by every other federal court in this country. The Sixth Circuit decision also casts doubt on the validity of at least seven state court decisions, each limiting regulation of churches by zoning ordinance. Literally thousands

upon thousands of county, municipal and township zoning authorities throughout the United States will be left to choose between state authority and federal authority to guide their enactment and enforcement of zoning ordinances unless this Court seizes the present opportunity to answer—with the authority only it possesses—the question set aside in *Euclid* over a half century ago.

The Sixth Circuit decision is unique in two respects: first, its ultimate holding that a municipality may lawfully exclude churches from most of its land area is without precedent in any federal court. Second, the method by which the Court arrived at that conclusion, eschewing the application of the strict scrutiny test, is equally unprecedented.

In limiting its application of the strict scrutiny test, the Sixth Circuit essentially eliminates from the protection of the First Amendment all religious practices which do not, in the court's view, rise to the level of a "cardinal principle" or "fundamental tenet." This is not, however, the only danger inhering in the Sixth Circuit decision. Equally perilous is the court's out-of-hand rejection of the possibility that anything less than a *direct* burden on activities protected by the Free Exercise Clause could ever constitute an infringement of First Amendment rights. The new test adopted by the Sixth Circuit can have only one effect: to radically circumscribe the First Amendment guarantee of free exercise of religion.

Congregations, be they churches, synagogues or other assemblies dedicated to religious purposes, have much to lose because of the Sixth Circuit's decision, which undermines their right to set aside places to meet for public worship. Not only for itself, but on behalf of each and every other religious assembly in this country, the Congregation urges this Court to

issue a writ of certiorari to the Sixth Circuit Court of Appeals and to review its decision in this case.

Respectfully submitted,

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APPENDIX A

No. 82-3004

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAKEWOOD, OHIO CONGREGATION OF JEHOVAH'S WITNESSES, INC., *Plaintiff-Appellant,*

v.

CITY OF LAKEWOOD, OHIO, *Defendant-Appellee.*

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed February 2, 1983.

Before: MARTIN, Circuit Judge; BROWN, Senior Circuit Judge; and SPIEGEL, District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. The principal question presented in this appeal is whether a municipal zoning ordinance, which prohibits the construction of church buildings in virtually all residential districts in the city, violates the Free Exercise Clause of the First Amendment.[1] Although many state courts have

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* Honorable S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.

[1] The Clause provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." It is applied to state and local governments through the due process clause of the Fourteenth Amendment. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940).

addressed this issue,[2] no other federal circuit court has resolved the question.

The Lakewood, Ohio Congregation of Jehovah's Witnesses, as a representative of its individual members, sued the City of Lakewood. It challenged the City's comprehensive zoning plan which designates portions of the City for exclusive residential use. The Congregation argued that the ordinance infringed its first, fifth, and fourteenth amendment rights[3] and asked for damages pursuant to 42 U.S.C. § 1983. The district court carefully analyzed each asserted ground for relief but found them all to be without merit. On appeal, the Congregation has argued only its first amendment claim. We find the claim meritless and affirm the judgment of the district court.

Lakewood, Ohio is a municipal corporation located on the western border of Cleveland with a population of approximately 62,000 residents. It is an older suburban community composed primarily of one- and two-family

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[2] California and Florida state courts have upheld municipal zoning ordinances which exclude churches from residential districts. However, many other states confronting similar ordinances have held them unconstitutional. *See* 82 Am. Jur. 2d Zoning and Planning § 154 (1976). Courts striking down such ordinances have reasoned that the presence of churches in residential areas is beneficial to the public morals and welfare. Any exclusion of churches from neighborhoods is "arbitrary and unreasonable," hence unconstitutional. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). This reasoning is problematical because an ordinance permitting churches but excluding secular interests also protected by the First Amendment runs afoul of the Establishment Clause. *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Heffron* v. *ISKCON*, 452 U.S. 640, 652-653 (1981) (religious interests are not "superior to [others] having social, political and other ideological messages to proselytize"). On the other hand, not all political and social organizations have been traditionally viewed as beneficial to public welfare and morals. Therefore, the original rationale for permitting churches in residential areas fails.

[3] For the sake of convenience and readability, this opinion will refer to the collective constitutional rights of members of the Congregation as "the Congregation's right."

residences. Its commercial districts line two major east-west arteries through the City. The City is well developed and few vacant lots for either commercial or residential use remain within its five and a half square mile limits.

The 175-member Congregation of Jehovah's Witnesses, a non-profit corporation organized under Ohio law in 1972, has worshipped in Lakewood since 1944. The Congregation's church building, called Kingdom Hall, is currently located in a storefront on one of the main commercial arteries in the City. Kingdom Hall houses regular programs on Tuesday evenings for Bible study, on Thursday evenings for theocratic school meetings, and on Sunday morning for worship services. The central tenets and missions of the Jehovah's Witnesses are the distribution of literature to homes and on the street, and the conduct of in-home Bible studies for the purpose of instructing and encouraging people to apply biblical teachings to daily life.

In 1972 the Congregation decided to relocate Kingdom Hall and began searching for a site more conducive to worship and capable of accommodating a larger building. In early 1972 it entered into an option contract for and subsequently purchased a half-acre lot in northwest Lakewood. The lot fronts on Clifton Boulevard, a six lane east-west thoroughfare, and West Clifton Avenue, a north-south secondary route. The surrounding neighborhood consists of large, stately one- and two-family homes, most of which were constructed before 1930. The design for the new Kingdom Hall featured a low, square building with a rustic stone exterior intended to blend with the neighboring properties. The design, insofar as possible, preserved the trees on the land and sheltered the forty-two car parking lot from homes nearby.

When the Congregation entered into the option contract for the lot, the area was zoned for residential use. However, the Board of Zoning Appeals had power to grant zoning exceptions. Before the Congregation pur-

chased the lot, the Board denied its application for an exception because a church on the corner would create traffic hazards, increase noise levels, potentially decrease property values, and cause various other problems. The Cuyahoga County Common Pleas Court and the Court of Appeals for Cuyahoga County affirmed the Board's decision.

In 1973, after the Congregation had purchased the lot, the City enacted a new zoning code, Lakewood Ordinance 55-78. The ordinance divided the City into the following districts:

One Family District	R-1 District
One Family District	R-2 District
Two Family District	R-3 District
Multiple Family, Low Density	M-1 District
Multiple Family, Medium Density	M-2 District
Multiple Family, High Density	M-3 District
Business-Residential	BR District
Office District	B-1 District
Retail District	B-2 District
Industrial District	X District
Flood Plane	FFP District

The Congregation's lot is designated R-2, limiting its uses to single family dwellings and "roomers." Church buildings are permitted only in M-3, M-2, B-R, and B-2 districts, which comprise approximately ten percent of the City's land.

In 1975 the Congregation again sought approval to construct a church on its lot. The Building Commissioner of Lakewood denied the Congregation a building permit because the area was zoned exclusively for residential use. The Cuyahoga County Common Pleas Court found the Lakewood zoning code to be constitutional. *Lakewood Ohio Congregation* v. *Lakewood, et al.*, 9 Ohio Ops. 3d 314 (1978). However, on appeal the county appellate court ordered the lower court to determine whether or not the ordinance is constitutional as applied to the Congregation's lot specifically. The common pleas court had not reached a decision on the

question at the time the Congregation filed this present suit in the Northern District of Ohio.

The question before us is whether the Lakewood zoning ordinance is constitutional. The Congregation claims that the ordinance infringes its right to freedom of religion by prohibiting it from constructing Kingdom Hall on the lot it owns. If the ordinance does infringe the Congregation's first amendment right, the City must justify the ordinance by a compelling governmental interest. *Sherbert* v. *Verner,* 374 U.S. 398 (1963). *See also Braunfield* [sic] v. *Brown,* 366 U.S. 599 (1961); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). If there is no first amendment infringement, we must determine whether the ordinance denies the Congregation the liberty to use its property without due process, violating the Fourteenth Amendment. According to traditional analysis a zoning ordinance does not violate the Due Process Clause if it is reasonable and substantially related to governmental public welfare concerns. *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926).

Whether the Lakewood ordinance should be subject to "compelling interest" or "rational basis" scrutiny depends on whether the ordinance in fact infringes the Congregation's right to free exercise of religion. Commonly, courts evaluate an infringement of religious freedom in terms of the burdens government imposes on the exercise of religious freedom. As a general rule, the greater the cost of practicing one's religion, the more probable that the statute creates an unconstitutional infringement.

The landmark cases of *Wisconsin* v. *Yoder* and *Sherbert* v. *Verner* depict primary examples of government actions which infringe religious freedom. In *Yoder* the price of religious observance was the imposition of criminal penalties. There, a Wisconsin statute compelled school attendance until the age of sixteen. The statute conflicted with the religious beliefs and practices of the Old Order Amish who withdrew their children from school after eighth grade to protect them

from harmful worldly influences. The Supreme Court recognized:

> The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.

406 U.S. at 218.

In *Sherbert* the Supreme Court identified severe, life-threatening economic sanctions as infringements of religious freedom. In that case, South Carolina denied unemployment benefits to a Seventh Day Adventist because she refused to accept available jobs. The state ignored the fact that the believer's religion prohibited her from accepting jobs which required Saturday attendance. The state ruling

> forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.
>
> * * *
>
> [To] condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

374 U.S. at 404-406.

Braunfield v. *Brown,* 366 U.S. 599 (1961), presents an informative contrast to *Yoder* and *Sherbert*. *Braunfield* held that one's religious freedom is not infringed by a statute which makes religious observance more expensive. Orthodox Jewish merchants who rested from work on Saturday challenged the Pennsylvania Sunday closing law. That law effectively required Jewish merchants to make a financial sacrifice to practice their religion. However, the incidental economic burden was

not unconstitutional because neither the purpose nor the effect of the law was to impede religious observation or to discriminate among religions. 366 U.S. at 607. Inconvenient economic burdens on religious freedom do not rise to a constitutionally impermissible infringement of free exercise.

Although a court's primary concern in determining whether religious freedom has been infringed must necessarily be the cost, economic or otherwise, attached to religious observance, case law highlights a secondary concern. The centrality of the burdened religious observance to the believer's faith influences the determination of an infringement. Religious observances in the form of beliefs are absolutely protected from governmental infringement. *Cantwell* v. *Connecticut,* 310 U.S. 296, 303 (1940). Practices flowing from religious beliefs merit protection when they are shown to be integrally related to the underlying beliefs. In *Wisconsin* v. *Yoder,* the Amish people's decision to withdraw children from school accorded with a "fundamental tenet" of their religion. 406 U.S. at 218. The Seventh Day Adventist who refused Saturday employment followed "a cardinal principle of her religious faith." 374 U.S. at 406. In *Heffron* v. *ISKCON,* 452 U.S. 640 (1981), members of the Krishna faith sought to practice their religious ritual of Sankritan, proselytizing through the distribution and sale of religious literature. The Supreme Court again recognized the important role the infringed ritual played in the propagation of the Krishna's faith. *See also United States* v. *Lee,* —— U.S. ——, 71 L.Ed.2d 127 (1982) (Amish carpenter's faith forbid the payment of Social Security taxes).

Focusing again on the present case, it is clear that we must make a two-step inquiry to determine whether the Lakewood zoning ordinance infringes the Congregation's free exercise of religion. First, the nature of the religious observance at stake must be evaluated. And second, the nature of the burden placed on the religious observance must be identified.

The Congregation's "religious observance" is the construction of a church building in a residential district. In contrast to prior cases, the activity has no religious or ritualistic significance for the Jehovah's Witnesses. There is no evidence that the construction of Kingdom Hall is a ritual, a "fundamental tenet," or a "cardinal principle" of its faith. At most the Congregation can claim that its freedom to worship is tangentially related to worshipping in its own structure. However, building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs. The zoning ordinance does not prevent the Congregation from practicing its faith through worship whether the worship be in homes, schools, other churches, or meeting halls throughout the city. The ordinance prohibits the purely secular act of building anything other than a home in a residential district.

The burdens imposed on the Congregation by the ordinance are an indirect financial burden and a subjective aesthetic burden. The Congregation may build a church in Lakewood only in commercial or multi-family residential districts. Land in these districts is more expensive and, the Congregation claims, less conducive to worship than the area where the lot is located. However, this is not a case where the Congregation must choose between exercising its religious beliefs and forfeiting government benefits or incurring criminal penalties. No pressure is placed on the Congregation to abandon its beliefs and observances. While it is true that the Congregation would face penalties if it began building on the proposed site, the penalties would not have the purpose or the effect of dissuading the Congregation from practicing its faith. In short, the burdens of the ordinance are the increased cost of purchasing land and the violation of the Congregation's aesthetic senses, if the Congregation chooses to build a new church in Lakewood.

Contrary to the Congregation's arguments, this case does not present a situation similar to *Keego Harbor*

Company v. *City of Keego Harbor,* 657 F.2d 94 (6th Cir. 1981). In *Keego Harbor* a zoning ordinance effectively excluded adult movie theaters from the city by setting severe spacing limitations. This court found the ordinance unconstitutional because its purpose and effect were to eliminate from the city the exercise of a first amendment right. The Congregation argues that the Lakewood ordinance effectively eliminates religious worship from the city because it limits the location of new churches to ten percent of the City.

We disagree. The effect of the Lakewood ordinance is not to prohibit the Congregation or any other faith from worshipping in the City. Although the Congregation may construct a new church in only ten percent of the City, the record does not indicate that the Congregation may not purchase an existing church or worship in any building in the remaining ninety percent of the City. Furthermore, unlimited numbers of churches may be constructed in the appropriately zoned areas, confined only by the number of lots. The lots available to the Congregation may not meet its budget or satisfy its tastes but the First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to churches. Unlike the Keego Harbor ordinance, the Lakewood ordinance does not exclude the exercise of a first amendment right, religious worship, from the City. *Compare Young* v. *American Mini Theaters,* 427 U.S. 50 (1976) *with Schad* v. *Borough of Mt. Ephraim,* 452 U.S. 61 (1981).

The Supreme Court's statement in *Braunfield* accurately summarizes our conclusion about the nature of the Congregation's interest and the nature of the City's burden on that interest. The Lakewood ordinance "simply regulates a ***secular activity*** and, as applied to the appellants, operates so as to make the practice of their religious beliefs ***more expensive.***" 366 U.S. at 605 (emphasis added). It does not pressure the Congregation to abandon its religious beliefs through financial or criminal penalties. Neither does the ordinance tax the

Congregation's exercise of its religion. Despite the ordinance's financial and aesthetical imposition on the Congregation, we hold that the Congregation's freedom of religion, as protected by the Free Exercise Clause, has not been infringed.

The answer to the threshold question is that there is no infringement of religious freedom. Accordingly, the constitutionality of the zoning ordinance must be measured by a due process analysis. The landmark zoning case is *Village of Euclid* v. *Ambler Realty Company,* 272 U.S. 365 (1926). In *Euclid* the Supreme Court upheld the validity of a comprehensive zoning plan which excluded commercial activities from residential districts. The plan deprived the landowner/plaintiff some freedom to use the land for all purposes. The Court held zoning ordinances to be legitimate exercises of a municipality's police power if the ordinances are not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." 272 U.S. at 395. The Court also established a legal presumption in favor of constitutionality "[i]f the validity of the legislative classification for zoning purposes be fairly debatable." 272 U.S. at 388. Finally, the *Euclid* Court recognized, "The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, a stamp of invalidity." 272 U.S. at 392.

Subsequent cases have identified a locality's specific prerogative to create exclusive residential districts for the health and well-being of its citizens. The Supreme Court acknowledged a village's police power as "ample to layout zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 9 (1974). In *Belle Terre* the village limited the number of cohabiting, non-related individuals to two in an effort to create a "quiet place where yards are wide, people few, and motor vehicles restricted." 416 U.S. at 9. In *Memphis* v. *Green,* 451 U.S. 100

(1981), the Court upheld a city ordinance, against challenges of racial discrimination, which diverted the flow of commuter traffic from a residential neighborhood. Again, the Court recognized that a municipality may, within constitutional limits, zone to preserve a peaceful residential sanctuary for its citizens. The Memphis ordinance conformed to constitutional limits because it was not arbitrary or irrational. *See also Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977) (denial of building permit for multi-family low income housing in accordance with rational zoning scheme).

Given the standard of review established in *Euclid* and its progeny, and the minimal burden on Lakewood to justify its zoning ordinance, we hold that the ordinance does not violate the Due Process Clause. The District Court found that the City created exclusive residential districts to control traffic congestion and off-street parking in secluded residential areas. The exclusion of all uses except residential substantially minimizes congestion, noise and confusion due to motor vehicle traffic. The City has legitimately and rationally exercised its police power to preserve a "quiet place where yards are wide, people few, and motor vehicles restricted." *Belle Terre,* 416 U.S. at 9.

The Congregation contends that the *Euclid* rationality test and deference to legislative enactments are inapplicable to the present situation. First, the Congregation cites *Moore* v. *City of East Cleveland,* 431 U.S. 494 (1977), for the proposition that an ordinance which regulates a fundamental right must be more than merely rationally based; it must be justified by a compelling governmental interest. *Moore* is inapposite. As established earlier, the Lakewood ordinance does not infringe or regulate the fundamental right of religious freedom. Additionally, in *Moore* the city attempted to define "family" with the effect of intruding into and severing family relationships. In contrast to *Moore* the Lakewood ordinance makes no attempt to define

"religion" or "church" to distinguish among religious uses. Second, the Congregation contends that the ordinance is not narrowly tailored to fit the City's articulated purposes. The Congregation relies on a string of cases for its least restrictive means argument, including *Village of Schaumberg* v. *Citizens for a Better Environment,* 444 U.S. 620 (1980), *Wisconsin* v. *Yoder,* and *Sherbert* v. *Verner.* The cases are inapplicable to the present situation because the Congregation has failed to demonstrate the requisite infringement of a fundamental right. *If* an ordinance infringes a fundamental right, *then* it must be justified by a compelling governmental interest employing the least restrictive means to achieve its purposes. *Sherbert* v. *Verner,* 374 U.S. at 407; *Schad* v. *Borough of Mt. Ephraim,* 452 U.S. 61, 74 (1981) (ordinance which excludes live entertainment violates First Amendment). Concededly, the City has drawn broad lines to protect its tranquil neighborhoods but these lines are a "reasonable margin to insure effective enforcement" of quiet residential zones.

In summary, the Lakewood ordinance is constitutional although it creates exclusive residential districts and thereby prohibits the construction of church buildings in the districts. The facts of the present case show that the ordinance does not infringe the Congregation's religious freedom. Furthermore, the ordinance does not offend the Due Process Clause because it is a legitimate exercise of the City's police power. The ordinance merely frustrates the Congregation's desire to locate itself in a more pleasant, more convenient and less expensive location. Such desires, however, are not protected by the Constitution.

Judgment affirmed.

APPENDIX B

CONTIE, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAKEWOOD, OHIO CONGREGATION OF JEHOVAH'S WITNESSES, INC.
Plaintiff,

v.

CITY OF LAKEWOOD, OHIO
Defendant.

Civil Action
C80-1939

MEMORANDUM OPINION AND ORDER

This case, dealing with the constitutionality of zoning restrictions upon churches, was tried before the Court on July 14, 15, 16, and 17, 1981. The plaintiff is the Lakewood, Ohio Congregation of Jehovah's Witnesses; the defendant, the City of Lakewood, Ohio. Below are the Court's findings of fact and conclusions of law, pursuant to Rule 52, Federal Rules of Civil Procedure.[1]

FACTS

Lakewood, a Cleveland suburb, is an older, residential community with a population of approximately 62,000.

The Lakewood Congregation of Jehovah's Witnesses has worshipped in the community since 1944 in a store-front building on Madison Avenue, one of the city's two main commercial thoroughfares.

Desiring to erect a larger, more attractive building

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[1] At the end of plaintiff's case, the City moved to dismiss the action pursuant to Rule 41(b). The Court deferred ruling on the motion until after the close of all the evidence. Since the Court now rules on the merits of the case, defendant's motion to dismiss is denied.

with more off-street parking, the Congregation[2] in 1971 started looking for a suitable lot on which to build a church, or Kingdom Hall. Because Lakewood is so well developed, very few vacant lots were available. The Congregation rejected the one or two lots it saw in the commercial district because they were unattractive, provided little space for off-street parking, and were very expensive.

In January 1972, the Congregation entered into an option contract for the purchase of a one-half acre lot for $25,000. The wooded lot was situated at the intersection of Clifton Boulevard, a heavily-traveled, six-lane thoroughfare; and West Clifton Avenue, a main secondary traffic route. The neighborhood surrounding the lot was residential, consisting primarily of large one- and two-family homes built over fifty years ago.

The Congregation had an architect design a low, square building with a rustic stone exterior for use as its new Kingdom Hall. The plans provided for 42 parking spaces in a lot behind the building. The design was intended, insofar as possible, to preserve the trees and allow the facility to blend in with the existing character of the neighborhood.

At the time the Congregation entered into the option contract, the lot was zoned for single-family use. The Congregation applied for a special exception to build a church, as provided by the zoning code then in effect. On January 18, 1972, the City's Board of Zoning Ap-

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[2] Until 1972 the Congregation was an unincorporated association; in 1972 it became a nonprofit corporation under the laws of Ohio. The Court uses the term "Congregation" to refer both to individuals acting on behalf of the unincorporated association prior to 1972 and to the corporation, Lakewood, Ohio Congregation of Jehovah's Witnesses.

"Congregation" is also used in two other senses; throughout most of the opinion "Congregation" refers to the legal entity, the plaintiff in this action. At other times, particularly in the section discussing the free exercise of religion, "Congregation" refers to the individuals comprising the religious organization.

peals denied the application because the proposed building would increase the traffic at an already congested intersection and because twelve of the immediately adjacent property owners objected. The Congregation appealed this decision to the courts of the State of Ohio, where it was upheld.[3]

Despite the denial of a special exception, on May 1, 1972, the Congregation exercised its option to purchase the lot and, on June 6, 1972, took title to the property.

On July 2, 1973, the Lakewood City Council enacted a new zoning code. This zoning code was intended, among other purposes:

(a) To guide the future development of the City in accordance with the Land Use Plan herein set forth and to bring about the gradual conformity of all land and building uses with such plan;

(b) To provide adequate, open spaces for light and air, to prevent overcrowding of the land, to prevent excessive concentration of population and to prevent uncoordinated development;

(c) To establish zoning patterns that will insure economical extensions for sewers, water supply and other public utilities, and developments for recreation, schools and other facilities;

(d) To locate buildings and uses in relation to streets in a way that will cause the least interference with, and be damaged least by, traffic movements and hence result in lessened street congestion and improved public safety;

(e) To protect the character and value of residential, business, industrial, institutional and public uses and to insure their orderly and beneficial development.[4]

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[3] See Lakewood Congregation of Jehovah's Witnesses v. City of Lakewood, Ohio, No. 902820 (Court of Common Pleas, Cuyahoga, Nov. 27, 1972). *Aff'd* No. 32386 (Court of Appeals, 8th District, March 21, 1974). Motion for certification denied, No. 74-1974, Ohio Supreme Court, July 17, 1974.

[4] Codified Ordinances of Lakewood, Sec. 1101.04.

Under the new code, the Congregation's lot was in an R2 residential district. The only special exception to single-family use permitted in the R2 district was "roomers." Unlike the old code, the new zoning code made no provision for a church as a special exception in the district containing the Congregation's lot.

Nonetheless, on April 9, 1975, the Congregation again applied for a building permit to construct its Kingdom Hall on the corner of Clifton Boulevard and West Clifton. The building commissioner denied the permit on the grounds, first, that the application was for the same building on the same lot as the City had earlier denied and which denial the courts had upheld, and second, that churches were not a permitted use in an R2 zoning district.

The Congregation now challenges the constitutionality of that part of the 1973 zoning code that prohibits it from erecting a Kingdom Hall on its property at the corner of Clifton Boulevard and West Clifton.

At trial, the Congregation attempted to show that its proposed use of the corner would not disrupt the community or increase traffic problems in the area. Witnesses testified that the Congregation has a membership of slightly over 100. On Sunday mornings, about 110 people attend services. On Tuesday evenings, 50 come for Bible school. On Thursday evenings 80-90 people attend theocratic school and services. The Congregation uses its Kingdom Hall at no other times; it holds no social activities in the building and does not lend its facilities to other groups.

The Congregation would like to grow and believes that the proposed Kingdom Hall would help it attract new members. If the Congregation were to reach about 160 people, it would split into two congregations, each using the Kingdom Hall at different times. The building then would be used about six times a week.

The proposed parking lot behind the hall, which would closely abut the property of the adjacent land-

owners, would have an entrance on West Clifton and an exit on Clifton Boulevard. The number of automobiles entering and exiting the lot during a week would, if one congregation used the building, not exceed the number of entrances and exits generated by three single-family residences (which the parties agreed would be the most logical use for the property if a church could not be built on it). Although the Congregation's use of the property would not occur during the hours of peak traffic, it would entail many cars entering and exiting at the same time.

Some question exists whether the proposed parking lot would be adequate (particularly if the Congregation's membership increases as hoped for). If it would not be, no off-street parking is permitted on Clifton Boulevard or West Clifton, and members of the Congregation would have to park on nearby side streets.

The City attempted to show that the Kingdom Hall would create a traffic hazard. In addition, it argued that the ordinance's lack of provision for the building of churches in residential districts was reasonable insofar as other denominations not only have larger congregations but also use their church buildings for a variety of social and community activities, which would greatly increase the noise and traffic created by a church's presence in the neighborhood.

CONCLUSIONS OF LAW

In its complaint the Congregation alleges that through the zoning ordinance the City of Lakewood has violated four of its constitutional rights:

1. Its right to the equal protection of the laws.

2. Its right to compensation for any taking of property for governmental use.

3. Its right not to be deprived of its liberty or property without due process of law.

4. Its right to the free exercise of religion.

The Court finds no merit in these contentions.

1. EQUAL PROTECTION

The Congregation contends that the zoning ordinance denies it the equal protection of the laws. In determining the validity of a legislative classification a court will defer to the legislative judgment if the classification bears a rational relationship to a legitimate governmental purpose. Only if the classification is suspect or impinges upon a fundamental right will a court examine the legislation with close scrutiny. Legislation that classifies on the basis of religion would impinge upon the fundamental right to the free exercise of religion and would warrant close scrutiny.

On its face, the zoning ordinance does not discriminate against religion as a whole or against the Jehovah's Witnesses in particular. That part of the zoning ordinance listing permitted uses in R2 districts classifies on the basis of the use of land and distinguishes between single-family residential use and all other uses —whether multiple-family or non-residential. The ordinance does not single out churches as an impermissible use, but disallows them along with all other institutions, secular and sacred, profit and non-profit.

Even if an ordinance does not on its face discriminate against religion, it may offend the Equal Protection Clause if applied "with an evil eye and an unequal hand." *Yick Wo v. Hopkins,* 118 U.S. 356, 373-74 (1886). No evidence was introduced in the instant case to show that the ordinance has been applied in a manner that discriminates against churches in general or the Jehovah's Witnesses in particular. There was no testimony that other institutions have been granted variances in R2 districts despite the lack of provision for such variances in the ordinance. Without proof of such unequal application, the Court cannot find the ordinance unconstitutional as applied.

An ordinance neutral on its face and in its application may still run afoul of the Equal Protection Clause if its "purpose and effect" is to discriminate. *Arlington*

Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). The Congregation has not demonstrated that the purpose or effect of the R2 zoning ordinance is to discriminate against religion or the Jehovah's Witnesses. Although the Congregation alleged in its complaint that the City amended the zoning laws with the intent to prevent the plaintiff from building a Kingdom Hall at the corner of Clifton Boulevard and West Clifton, no testimony was introduced to that effect. Neither did the testimony succeed in showing that the impact of the ordinance was either to prevent the Jehovah's Witnesses from practicing in Lakewood or to inhibit the practice of religion generally in the city.

The Congregation has not shown that the classification of uses in the R2 district into single-family residential use and all other use discriminates against the fundamental right to the free exercise of religion, on its face, in its application, or in its purpose and effect. Hence the Court need only inquire whether a rational basis exists for the classification. The Court finds that the classification is designed to control population density within the district, and is rationally related to the legitimate governmental purpose of regulating municipal growth, curtailing traffic, reducing noise, and enhancing the aesthetic properties of the area.

2. JUST COMPENSATION

The Congregation contends that the 1973 change to the zoning code that no longer allows for churches as special exceptions in R2 districts amounted to a "taking" of its property for which it is entitled under the fifth and fourteenth amendments to just compensation.[5] The application of a general zoning statute to a particular piece of property will effect a taking if the

[5] The Just Compensation Clause of the fifth amendment has been made applicable to the states through the fourteenth amendment. See *Chicago B & Q. Rd. Co. v. Chicago,* 166 U.S. 226, 239 (1897).

ordinance denies the owner an economically viable use for his land. *Agins v. City of Tiburnon,* 447 U.S. 255, 260 (1980); *Hernandez v. City of Lafayette,* 643 F.2d 1188 (5th Cir. 1981). For a taking to exist the zoning ordinance must destroy or substantially diminish the value of the land. *Harris v. United States,* 467 F.2d 801 (8th Cir. 1972).

The Congregation's land has not decreased in value. The Congregation purchased the lot in 1972 for $25,000. Both the appraiser who testified for plaintiff and the appraiser who testified for defendant estimated that the value of the lot in 1975, at the time the Congregation applied for a building permit under the new zoning ordinance, was approximately $30,000. Plaintiff's witness appraised the fair market value of the lot in 1981 as $47,500. [Exhibit #2, p. 10.]

The zoning ordinance has not rendered the land valueless. The Congregation can sell the land for almost twice what it paid for it, or it can build up to three single-family residences on it. Although plaintiff's appraiser and defendant's appraiser disagreed about whether the land was better suited to institutional or residential use, they both agreed that the land was suitable for residences and that its value for such purpose was not substantially less than for use as a church. That the Congregation wants to build a church on the lot and has no desire to erect residences has no bearing on whether the City has taken its property. For the Court must consider fair market value of the property, not value to the individual owner.[6] The Court thus finds that the Lakewood ordinance has not effected a taking of the Congregation's property in violation of the fifth and fourteenth amendments.

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[6] For the purposes of a taking, value of land is not measured subjectively; therefore the Court need not speculate upon the difference in value to the Congregation between land zoned residential with discretionary special exceptions permitted but denied, and land zoned residential with no variances permitted.

3. DUE PROCESS

The Congregation contends that the Lakewood zoning ordinance denies it the use of its property without due process of law.[7] The classic analysis of such a substantive due process objection to a zoning ordinance is *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In *Euclid*, the Supreme Court upheld the validity of a general zoning plan with use restrictions. The Court held that such zoning restrictions are a legitimate exercise of the police power and that before a zoning ordinance can be declared violative of due process, the provisions must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid* at 395. The Court further held that: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Euclid* at 388.

Given the standard of review established by *Euclid* and the minimal burden upon the City to justify zoning classifications, the Court finds that the ordinance does not violate the Due Process Clause. The City has articulated as its justification for excluding churches and other institutions from R2 districts the public safety and welfare—specifically, the control of traffic congestion and on-street parking. The court cannot say that the zoning ordinance bears no relation to this end and is therefore arbitrary and capricious.

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[7] The Court has found that there has been no taking of plaintiff's property for purposes of the Just Compensation Clause; it would appear that there has been no deprivation of property for purposes of the Due Process Clause. Although in discussing land regulation, many courts blend due process and just compensation analysis, the test for taking and for deprivation of property under the two clauses may not be identical. Under a just compensation analysis, one asks for damages; under due process, for an injunction. Therefore the necessity that the fair market value of the property have diminished may not be present in a due process analysis. Furthermore, in the instant case—as in all zoning cases—plaintiff protests its inability to use its land as it pleases. It thus claims a deprivation of liberty.

The City has not proven that the proposed Kingdom Hall would create a traffic hazard; however, it has no such burden. For over-inclusiveness will not invalidate a zoning restriction. The *Euclid* Court held: "The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity." *Euclid* at 388-399. Citing an earlier case, the Court also noted: "The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful." *Id.* at 392. Furthermore, the party attacking the reasonableness of a zoning ordinance has the burden of proof on that issue. *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962).

In *Euclid* the Supreme Court considered the constitutionality of excluding commercial activities from residential districts. Although the comprehensive zoning plan challenged also excluded churches, schools, libraries, and other buildings from certain districts, the Court specifically reserved consideration of these restrictions. Some of the factors that the Court listed as grounds for the exclusion of commercial activity from residential areas are not present when one considers the effect of churches upon residential districts. Churches, for example, are unlikely to create a danger of contagion or disorder. But churches, and other uses for which large numbers of people assemble, do increase traffic, which in turn increases accidents, noise, air pollution, and congestion. These are all factors considered in *Euclid* to provide a rational basis for zoning restrictions.

Plaintiff contends that application of the rational basis test articulated in *Euclid* is inappropriate because the Lakewood ordinance attempts to regulate a fundamental right. In such a case, closer scrutiny is appropriate. *Schad v. Borough of Mount Ephraim,* 101 S.Ct. 2176 (1981). Plaintiff relies heavily on *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), in which the

Supreme Court struck down a housing ordinance that defined as a "family" only a few categories of related individuals and prevented a child from residing with his grandmother. The Supreme Court held that "when a city undertakes such intrusive regulation of the family," *Euclid* does not govern, and "the usual deference to the legislature is inappropriate." *East Cleveland* at 499.

The Lakewood ordinance does not impinge upon the practice of religion within the community as the East Cleveland ordinance impinged upon family relationships and the right to privacy. The City has not attempted to define "church," permitting within its boundaries only those religious organizations that meet its definition. The Supreme Court did not hold in *East Cleveland* that families had to be permitted to reside in all districts in the city but only that "family" could not be defined so as to exclude people from the community. The Lakewood ordinance excludes no one from the City of Lakewood and no religious group. Neither does the ordinance completely ban from the community an activity protected by the first amendment, as did the zoning ordinance that barred live entertainment in *Mount Ephraim.*

Using a due process analysis, a number of state courts have adopted a rule that churches may not be totally excluded from residential zones. *See Annot.* 74 A.L.R. 2d 377 (1960). These courts reason that the presence of churches is beneficial to the public morals and welfare; hence any blanket prohibition on their presence in a zone is *per se* "arbitrary and unreasonable." A church must be a permitted use in a residential district and denial of a building permit must be based upon a showing that the presence of the church would actually endanger the public safety or welfare. *See State ex rel Synod of Ohio v. Joseph,* 139 Ohio St. 229 (1942); *Milwaukie Co. of Jehovah's Witnesses v. Mullen,* 330 P.2d 5, 74 ALR 2d. 347, (Ore. 1958), *cert. denied,* 359 U.S. 436 (1959).

An ordinance that specifically excluded churches

while permitting secular institutions to which similar numbers of people would come in similar numbers of cars at similar times would be *per se* unreasonable. But an ordinance that permitted churches as *ipso facto* beneficial to the community while barring secular institutions would run counter to the Establishment Clause, which requires that the government be neutral toward religion and not favor religious activities or institutions over secular ones. *See Abington School District v. Schempp,* 374 U.S. 203 (1963).[8]

The Court consequently finds that Lakewood's zoning restriction upon churches along with other institutions similarly situated, based upon considerations related to the numbers of people using the facility, is a valid exercise of the state's police power and not violative of due process guarantees.

4. FREE EXERCISE OF RELIGION

The Congregation contends that the zoning ordinance interferes with the free exercise of its religion. In *Euclid* the Supreme Court left open the question of the constitutionality of zoning provisions prohibiting churches in certain districts, and the issue has not come before the Court again.

In determining the constitutionality of other types of statutes under the free exercise clause, the Supreme Court has applied a two-step test: (1) Has the state infringed upon the free exercise of religious beliefs?

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[8] *Walz v. Tax Commission of City of New York,* 397 U.S. 664 (1970), which held that a state constitutional provision exempting religious institutions from taxation does not violate the Establishment Clause, is distinguishable. First, the constitutional provision in question did not single out religious institutions alone for special treatment. Rather it granted them tax-exempt status along with a host of other non-profit, quasi-public corporations, including hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. Second, religious groups have had "two centuries of uninterrupted freedom from taxation"; "an unbroken practice of according the exemption to churches . . . is not something to be lightly cast aside." *Walz* at 678.

(2) If so, is the infringement justified by a compelling state interest? *Sherbert v. Verner,* 374 U.S. 398 (1963). The initial step in this Court's analysis is to determine whether the Congregation's claim satisfies the first prong of this test; hence what follows is a consideration of whether the City has infringed upon the Congregation's exercise of its religious beliefs.

The state may regulate the time, place, and manner in which religious views are disseminated, if it does so in a non-discriminatory fashion. The state may, for example, regulate the time and manner of solicitation, including religious proselytizing, "in the interests of public safety, peace, comfort, or convenience." *Cantwell v. Connecticut,* 310 U.S. 296, 306-07 (1940). *See also Heffron v. International Society for Krishna Consciousness,* 101 S.Ct. 2559 (1981).

However, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder,* 406 U.S. 205, 220 (1972).

The application of a regulation need not be uneven in order to infringe upon the free exercise of religion. The regulation need merely have the side effect of burdening an individual or group in the exercise of their religious beliefs. The free exercise of religion is infringed when a seemingly neutral state regulation forces an individual to choose between violating his religious principles and subjecting himself to a government-imposed penalty or forfeiting a government benefit. *See Wisconsin v. Yoder; Sherbert v. Verner.*

Thus, the Supreme Court has held unconstitutional the application of unemployment compensation statutes to deny benefits to a person who refuses for religious reasons to accept work on Saturdays, and to one who refuses for religious reasons to continue working in a munitions factory. *Sherbert v. Verner; Thomas v. Review Board of Indiana Employment Security Division,*

101 S.Ct. 1425 (1981). The Court found that such regulations put "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas* at 1432. Nothing in the Lakewood ordinance puts pressure on the Congregation to act in a manner contrary to its beliefs; indeed the ordinance does not require the Congregation to act at all in order to receive a benefit or avoid a penalty.

In *Wisconsin v. Yoder,* the Supreme Court, in deciding whether the state had infringed upon the Amish's free exercise rights, considered the degree of interference with the religious practices of the Amish, the centrality of the practice prevented by the state to the Amish's religious beliefs, and the effect of the infringement upon the vitality of the religious group.

In an earlier case involving the Jehovah's Witnesses, the Supreme Court struck down a municipal ordinance that required people soliciting door-to-door to pay a licensing fee. *Murdock v. Pennsylvania,* 319 U.S. 105 (1943). The Court held that an ordinance requiring religious colporteurs to pay a license tax infringed upon the freedom of religion by making payment a condition for exercise of a constitutional privilege. In reaching this conclusion the court noted that colportage is a tenet of the Jehovah's Witness' religion:

> They claim to follow the example of Paul, teaching "publickly, and from house to house." Acts 20:20. They take literally the mandate of the Scriptures, "Go ye into all the world, and preach the gospel to every creature." Mark 16:15. In doing so they believe they are obeying a commandment of God.[9]

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[9] In *Heffron v. International Society for Krishna Consciousness,* 101 S.Ct. 2559 (1981), the majority appears to have reversed *Murdock sub silentio.* The Court upheld against first amendment attack a Minnesota state fair rule requiring that the sale and distribution of literature be from a duly licensed location on the fair grounds. The Society for Krishna Consciousness contended that the rule suppressed the practice of Sankirtan, one of its religious rituals, which consists of going out into public places to distribute or sell

Id. at 108. This approach precurses that employed in *Wisconsin v. Yoder,* in which the court analyzed how central to their religious beliefs is the Amish's objection to formal education after the eighth grade.

The Congregation has not shown that the ordinance impinges directly upon its religious tenets or practices. Witnesses for the plaintiff testified that the Kingdom Hall at the proposed site would be more aesthetically pleasing than the present hall and more conducive to spiritual thought. Witnesses also conjectured that the lack of growth in the size of the Lakewood Congregation was the result of the inelegance of the present Kingdom Hall as well as the lack of parking at the present site. Neither of these statements demonstrates

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religious literature. The Court blended the claim that the rule inhibited the exercise of a religious rite with the Society's general free speech claim. In so doing, it denied any special status to the free exercise claim. Indeed, at one point the Court stated:

> "None of our cases suggest that the inclusion of a peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature." *Heffron* at 2566.

If one enjoys no greater protection because one's speech is part of a religious ritual, then the Congregation is entitled to no more protection than are publishing houses, printing presses, political organizations, and the like.

The test of the constitutionality of the ordinance under *Heffron* would be two-pronged. First, does the restriction serve a substantial state interest? Second, do alternative forums for the Congregation's expression of speech exist? Under this test, the ordinance passes constitutional muster. For the state's interest in traffic control and safety is substantial, and alternative forums (including the Congregation's present Kingdom Hall) in other use districts exist.

any relationship between the tenets of the faith and the desired location of the church. The frustrated desire of the Congregation to locate itself in a more pleasant and convenient location might be the desire of any individual or secular group. The Congregation has not shown that its claims are "rooted in religious beliefs." *Yoder* at 215.

Even though having a Kingdom Hall on the proposed site is not related to the Congregation's basic religious tenets and practices, the zoning ordinance might still violate the free exercise clause if it effectively prohibited the Congregation from practicing its faith within the city. *Cf. Keego Harbor Co. v. City of Keego Harbor,* 657 F.2d 94 (6th Cir. 1981) (effectively zoning adult theaters out of political entity held to violate first amendment). As noted above, the Congregation introduced no testimony that the City passed the ordinance with the intent of excluding the Jehovah's Witnesses. Neither has the Congregation challenged the effect of the zoning code as a whole upon religion in Lakewood; its claim is limited to the impact upon it of the lack of provision for churches in R2 districts.

Land in nonresidential areas of the City, where churches are a permitted use, is considerably more expensive than residential land. One result of the ordinance is therefore to require the Jehovah's Witnesses to pay more for land and consequently to make the building of a new Kingdom Hall in the city more expensive than would otherwise be the case. This result is merely incidental to the zoning ordinance; it is not a state-imposed tax or fee, such as the Supreme Court struck down in *Murdock*. While the state may not impose financial burdens on the expression of religion, neither need it insure that the least expensive land for sale in a city is zoned for church use. All the Congregation has succeeded in showing is that, as a result of the ordinance, building a new church in Lakewood is more expensive than it would be otherwise.

The Supreme Court has held such an indirect eco-

nomic burden insufficient to sustain a free exercise claim. In *Braunfeld v. Brown,* 366 U.S. 599 (1961), the Court upheld a Sunday closing law applied to Orthodox Jewish merchants whose religion compelled them to close on Saturday as well. The Court stated: "The Sunday law simply regulates a secular activity[10] and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." *Braunfeld* at 605. If the Lakewood ordinance were considered to affect the Congregation's exercise of religion at all, it clearly does so only indirectly by making the practice of its religion more expensive.

The ordinance does not prevent the Congregation from practicing its faith within the city limits. Lakewood is well built up; there is little land available on which to build anything. That the Congregation has had difficulty finding suitable space for a new Kingdom Hall does not necessitate the conclusion that the City has interfered with the free exercise of religion.

The Court finds that the Lakewood ordinance is secular in purpose and effect, that it has not been applied in a discriminatory fashion,[11] that it does not put pressure on the Congregation to abandon its religious practices, that it does not levy a tax or fee upon the Congregation's exercise of a constitutional right, that it does not impose a burden directly on the Congregation's practice of its religious faith, and that it does not prevent the Congregation from worshipping in Lakewood. In sum, the ordinance does not infringe upon the Congregation's free exercise of religion.

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[10] If a Sunday closing law is one "the purpose and effect of which is to advance the State's secular goals" (*Braunfeld* at 607) no question can exist about the secular nature of a comprehensive zoning ordinance.

[11] The 1973 change in the zoning code that no longer allows for special exceptions for churches removes the type of discretionary element in the granting of a permit that often leads to a finding that a regulation violates first amendment rights. *See Cantwell v. Connecticut.* 310 U.S. 296 (1940).

Since the Congregation has not met the first prong of the test enunciated in *Sherbert v. Verner* by proving that the state has infringed upon the exercise of its religion, the Court need not consider the second prong of the test and determine whether the ordinance is justified by a compelling state interest.

In conclusion, the Court finds that all of plaintiff's claims lack merit and, accordingly, finds in favor of the defendant, City of Lakewood.

IT IS SO ORDERED.

/s/ Leroy J. Contie, Jr.
U. S. District Judge

APPENDIX C

CODIFIED ORDINANCES OF LAKEWOOD
PART ELEVEN - ZONING CODE

CHAPTER 1101
Title; Establishment of Plan; Purposes; Intent; Definitions

1101.01 TITLE.

This Code shall be known as the "Zoning Code of the City of Lakewood" and the maps referred to herein and made a part of this Code shall be known as the "Zoning Map" and "Building Line Map".

1101.02 ESTABLISHMENT OF COMPREHENSIVE PLAN.

There is hereby established a Land Use Plan for the City of Lakewood, which plan is set forth in the text, maps and schedules of the Zoning Code, and which may be used as a guide for future land use development.

1101.03 PURPOSES.

This Zoning Code is adopted to promote and protect the public health, safety, convenience, comfort prosperity and/or the general welfare of the citizens of the municipality by regulating the use of land and buildings for residence, business, industrial or other uses; by regulating the area and dimensions of land, yards and other open spaces; by regulating and restricting the bulk, height, design, percent of lot occupancy and location of building; by regulating and limiting population density; and, for the aforesaid purposes to divide the City into districts of such number and kind as is deemed best suited to carry out these purposes and regulations.

1101.04 INTENT.

This Zoning Code is intended, among other purposes:

(a) To guide the future development of the City in accordance with the Land Use Plan herein set

forth and to bring about the gradual conformity of all land and building uses with such plan;

(b) To provide adequate, open spaces for light and air, to prevent overcrowding of the land, to prevent excessive concentration of population and to prevent uncoordinated development;

(c) To establish zoning patterns that will insure economical extensions for sewers, water supply and other public utilities, and developments for recreation, schools and other facilities;

(d) To locate buildings and uses in relation to streets in a way that will cause the least interference with, and be damaged least by, traffic movements and hence result in lessened street congestion and improved public safety;

(e) To protect the character and value of residential, business, industrial, institutional and public uses and to insure their orderly and beneficial development.

1101.05 GENERAL TERMS DEFINED.

The following terms shall have, throughout this Zoning Code, the meaning given herein:

(a) The word "shall" is to be interpreted as mandatory and not directory;

(b) The phrases "used for" or "occupied for", as applied to any land or building, shall be construed to include "arranged for", "designated for" or "intended for";

(c) All words used in the present tense include the future; the singular number includes the plural and the plural the singular, unless the content clearly indicates the contrary;

(d) The word "lot" includes the word "plot", the word "building" includes the word "structure", the word "City" shall mean the City of Lakewood, the terms "Commission" and "Board"

shall mean the Planning Commission and Board of Zoning Appeals respectively.

1101.06 DEFINITIONS.

The following words and terms shall have throughout this Zoning Code, the meaning given as hereinafter set forth in this Chapter.

1101.07 ACCESSORY USE.

"Accessory Use" means subordinate use which in the City of Lakewood is customarily but clearly incidental and related to that of the principal structure or land use, and located on the same lot as the principal use.

1101.08 ALTERATION.

"Alteration," applied to a building or structure, means a change or rearrangement in the structural parts or in the existing facilities or an enlargement, whether by extending on a side or by increasing in height, or the moving from one location or position to another.

1101.09 APARTMENT HOUSE.

"Apartment House" means a building arranged, intended or designed to contain three or more dwelling units, each for the exclusive use of one family.

1101.10 BASEMENT.

"Basement" means a story of a building located partly below the finished grade of the lot, but having at least one-half of its height above the finished grade.

1101.11 BUILDING.

"Building" means any structure having a roof supported by columns or by walls and intended for the housing or enclosure of persons, animals or chattels.

1101.12 BUILDING HEIGHT.

"Building Height" means the vertical distance measured in the case of flat roofs, from the curb level to the level of the highest point of the roof beams adjacent to the street wall, and in the case of pitched roofs, from the curb level to the mean height level of the

gable. Where no roof beams exist or there are structures wholly or partly above the roof, the height shall be measured from the curb level to the level of the highest point of the building.

1101.13 CELLAR.

"Cellar" means the story of a building having more than one-half of its height below the highest level of the finished grade of the lot.

1101.14 COVERAGE.

"Coverage" means that percentage of the lot area covered by a building, including any part of a floor not directly above the ground floor.

1101.15 CURB LEVEL.

"Curb Level" means the officially established grade of the curb in front of the mid-point of the lot.

1101.16 DWELLING UNIT.

"Dwelling Unit" means one or more living or sleeping rooms, with cooking, heating and sanitary facilities for one family.

1101.17 ONE-FAMILY DWELLING.

"One-Family Dwelling" means a detached building containing only one dwelling unit for exclusive use by one family, and having two side yards.

1101.18 TWO-FAMILY DWELLING.

"Two-Family Dwelling" means a detached building containing only two separate dwelling units each for the exclusive use by one family, each with its own exterior entrance doors, and having two side yards.

1101.19 MULTIPLE FAMILY DWELLING.

"Multiple Family Dwelling" means a building arranged, intended or designed to contain three or more dwelling units, each for the exclusive use by one family.

1101.20 FAMILY.

"Family" means an individual, or two or more persons

related by blood, marriage or adoption, or a group of not more than four persons not related by blood or marriage, living together as a single housekeeping group in a dwelling unit.

1101.21 HOME OCCUPATION.

"Home Occupation" is an accessory use of a service character customarily conducted in the City of Lakewood and carried on only by the residents thereof, which use is clearly incidental and secondary to the use of the dwelling for living purposes and does not change the character thereof, and provided that:

(a) No person other than members of the family residing on the premises shall be engaged in such occupation.

(b) Not more than ten percent of the floor area of the dwelling unit shall be used in the conduct of the home occupation.

(c) There shall be no change in the outside appearance of the building or premises, nor shall there be any window display or sign board or other visible evidence used to advertise any such home occupation.

(d) There shall be no sales of any kind in connection with any home occupation.

1101.22 LOT.

"Lot" means a parcel of land occupied or capable of being occupied by one building and the accessory building or use customarily incident to it, including such open spaces as are required by this Code.

1101.23 LOT AREA.

"Lot Area" means the total area within the property lines, excluding any portion of a street.

1101.24 LOT DEPTH.

"Lot Depth" means the average distance from the street line of the lot to its opposite rear line, measured in the general direction of the side lines of the lot.

1101.25 LOT WIDTH.

"Lot Width" means the width of the lot at the building line.

1101.26 NON-CONFORMING STRUCTURE.

"Non-Conforming Structure" means a structure, or portion thereof, lawfully existing on the effective date of this Code or subsequent amendments hereto, which does not conform to the zoning regulations applicable in the district in which it is located.

1101.27 NON-CONFORMING USE.

"Non-Conforming Use" means a use of a structure or land, lawfully existing on the effective date of this Code or subsequent amendments hereto, which does not conform to the zoning regulations applicable in the district in which it is located.

1101.28 PARKING SPACE.

"Parking Space" means the area required for parking one automobile and such area shall be at least ten (10) feet wide and twenty (20) feet long, exclusive of driveway.

1101.29 SIGN.

"Sign" means a structure, or part thereof, or any device attached to or painted directly or indirectly on a structure or placed on a parcel of land, which shall display or include any letter, model, banner, pennant, insignia, device or other representation to direct attention to a person, institution, oganization, activity, place, object, product, business or service. An address number shall not be considered a sign. National, state, county or city flags shall not be considered as signs.

1101.30 SPECIAL EXCEPTION.

"Special Exception" means the permitted use of property in a given district other than in the manner prescribed for such district, which use is allowable when the facts and conditions prescribed in the Zoning Code for the specific exception requested are found to exist by the Board of Zoning Appeals.

1101.31 STORY.

"Story" means that portion of a building included between the surface of any floor and the surface of the floor next above it, or if there be no floor above it, then the space between any floor and the ceiling next above it, not including cellar.

1101.32 STREET.

"Street" means a public way which affords the principal means of access to abutting properties.

1101.33 STRUCTURE.

"Structure" means anything built or erected, the use of which required either location on the ground or attachment to something having location on the ground including, among other things but not limited to barriers, bleachers, booths, buildings, display stands, fences, platforms, poles, pools, sheds, shelters, signs, tanks above or below ground, tents, towers and walls; and shall also mean the supporting framework or parts thereof and appurtenances thereto.

1101.34 TOWNHOUSE.

"Townhouse" means an attached single-family dwelling in a group of similar dwellings with no two dwelling units served by the same stairway or by the same exterior door.

1101.35 VARIANCE.

"Variance" means a deviation from the requirements of this Zoning Code granted by the Board of Zoning Appeals under the provisions of and as limited in Article XIV, Section 2, Paragraph 3 of the Charter of the City of Lakewood.

1101.36 YARD.

"Yard" means an open space on a lot, unoccupied and unobstructed from the ground to the sky.

1101.37 FRONT YARD.

"Front Yard" means an open, unoccupied space extending the full width of a lot between the building

line, as shown on the building line map, and the street line. Covered or uncovered porches, whether enclosed or unenclosed, shall be considered as part of the main building and shall not project into a required front yard.

1101.38 REAR YARD.

"Rear Yard" means an open, unoccupied space, on the same lot with the building, between the rear line of the building and the rear line of the lot and extending the full width of the lot. Covered or uncovered porches, whether enclosed or unenclosed shall be considered as part of the main building and shall not project into a required rear yard.

1101.39 SIDE YARD.

"Side Yard" means an open, unoccupied space extending from the building line, or front lot line where no building line is required, to the rear yard or lot line when no rear yard is required and abutting a side lot line; the required width of which yard is a prescribed minimum distance between the side lot line and a line parallel thereto on the lot.

CHAPTER 1107
One Family District, R2

1107.01 GENERAL PROVISIONS.

The following regulations shall apply to all One Family Districts (R2).

1107.02 PERMITTED PRINCIPAL USES.

In an R2 District, no building or premises shall be used or established which are designed, arranged or intended for other than the following:

(a) A one family dwelling house.

1107.03 PERMITTED ACCESSORY USES AND BUILDINGS.

The following accessory uses shall be permitted when

located on the same lot or parcel with a permitted principal use.

(a) A garage not to exceed 20 feet in width and 20 feet in depth notwithstanding of the requirements of Section 1107.10, provided, however, that a garage may exceed such dimensions if it complies with the requirements of Section 1107.10.

(b) One real estate sign, not exceeding five square feet per face in area, which advertises the sale or rent of the entire property on which such sign is located.

(c) Customary accessory uses and buildings, provided such uses and buildings are clearly incidental to the principal building and use. The parking of commercial motor vehicles in the yard area shall not be deemed an accessory use and is prohibited. Ord. 42-80

1107.04 SPECIAL EXCEPTIONS.

The following uses if approved by the Board of Zoning Appeals after public notice and public hearing may be permitted as a special exception provided that the conditions hereinafter specified are met:

(a) Roomers.

The keeping of not more than two (2) roomers in a single family building and one roomer per dwelling unit in a double, provided:

1) There shall be only one roomer to a sleeping room.

2) There shall be no cooking or eating facilities in the room, nor shall kitchen privileges or a community kitchen be provided.

3) An off-street parking space shall be provided in the rear yard for each roomer.

4) There shall be no signs on the property advertising rooms for rent.

5) The building in which the rooms are to be let shall be the permanent residence of the occupant of the dwelling unit.

1107.05 HEIGHT REGULATIONS.

In an R2 District, no building or structure shall exceed 35 feet in height above the curb level of the street on which it fronts.

1107.06 LOT AREA AND WIDTH REGULATIONS.

No lot shall be less than 5,000 square feet in area and less than 50 feet in width at the building line.

1107.07 SIDE YARD REGULATIONS.

The sum of the two side yards shall be not less than 15 feet. Neither side yard shall be less than 5 feet.

1107.08 REAR YARD REGULATIONS.

The rear yard depth shall not be less than 40 feet.

1107.09 FRONT YARD REGULATIONS.

Front yard shall be as established by the building line map.

1107.10 MAXIMUM LOT AREA USE.

The principal building shall cover not more than 20% of the lot. Accessory building or buildings shall cover not more than 20% of the area of the rear yard.

1107.11 ACCESSORY BUILDING REGULATIONS.

(a) Accessory buildings constructed of wood may not be constructed within 18 inches of any property line.

(b) Accessory buildings having masonry walls without wall openings and roof projections on the property line side of the building may not be constructed within six inches of the rear property line and one side line.

1107.12 OFF-STREET PARKING.

Two off-street parking spaces shall be provided for each dwelling unit. The front yard shall not be used for required off-street parking.

U.S. CONSTITUTION, AMEND. I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. CONSTITUTION, AMEND. XIV, § 1

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Tit. 42 U.S.C. § 1983

"SECTION 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 39310

LAKEWOOD, OHIO, CONGREGATION OF JEHOVAH'S WITNESSES, INC.

APPELLANT

-vs-

CITY OF LAKEWOOD, ET AL.

APPELLEES

APPEAL FROM

COMMON PLEAS COURT

No. 941,446

JOURNAL ENTRY

AND

OPINION

DATE MAY 17 1979

PATTON, J.:

Plaintiff appeals from the judgment of the trial court overruling its motion for summary judgment and granting summary judgment for defendants. For reasons which appear below, this court finds it necessary to remand this cause for further proceedings.

This case has an extremely long procedural history. In 1971, plaintiff applied for but was denied a permit to build a church. That administrative decision was appealed to the Court of Common Pleas, which affirmed the Board of Zoning Appeals action. The plaintiff appealed to this court, which also affirmed the decision.[1/]

In July, 1973, the City of Lakewood changed the zoning ordinance involved. In April, 1975, plaintiff applied to the city for a permit under the new ordinance. The permit was denied.

1/ In Lakewood, Ohio, Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood (Ct. App. Cuy. Cty., March 21, 1974), No. 32386, the Ohio Supreme Court overruled a motion for certification.

Plaintiff appealed to the Court of Common Pleas, alleging that the ordinance was unconstitutional (1) on its face and (2) as applied to plaintiff. The plaintiff filed a motion for summary judgment based upon the ground that the ordinance was unconstitutional on its face (it did not request summary judgment upon the ground that the ordinance was unconstitutional as applied). Defendant opposed the motion for summary judgment, arguing that summary judgment could not be granted because the outcome in a zoning situation depends on the facts of each case. Thus, the matter would have to proceed to trial to determine the pertinent facts.[2/] Secondly, defendant argued that churches are allowed in some residential districts, and a municipality, pursuant to its police power, has the authority to determine what will be permitted. In addition, defendant filed a counter-motion for summary judgment based upon res judicata. Defendant asserted that the earlier litigation prevented plaintiff from bringing a second action based upon essentially the same matter.

The trial court granted defendant's motion for summary judgment. It held that the ordinance was constitutional as applied to plaintiff based on the former action. The court specifically stated that it was not ruling on the constitutionality of the ordinance as a whole (on its face).

In February, 1977, this court reversed the decision of the lower court holding that the action was not barred by the doctrine of res judicata.[3/]

2/ As far as this first ground for opposing plaintiff's motion is concerned, defendant obviously confused plaintiff's allegations in its motion for summary judgment. Defendant responded as though plaintiff requested summary judgment on the issue of unconstitutionality of the ordinance as applied to plaintiff. As noted in the text, plaintiff moved only for summary judgment on the ground that the ordinance was unconstitutional on its face. Such is a question of law and not dependent on the facts of each case.

3/ Lakewood, Ohio, Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood (Ct. App. Cuy. Cty., Feb. 3, 1977), No. 36452. This court viewed the issues in the second controversy to be different from those in the first since: (1) the traffic patterns, which had played a major role in the initial litigation, may have changed and (2) the second suit was based on a different ordinance.

The effect was to reverse the lower court's granting of summary judgment for defendant and remand the case for further proceedings. As below, this court dealt only with the ordinance as applied to plaintiff.

Upon remand, the plaintiff's motion for summary judgment was still before the court. In July, 1977, the court overruled plaintiff's motion for summary judgment. Eighteen days later, plaintiff filed a "motion for reconsideration". In April, 1978, the trial court granted plaintiff's motion to reconsider and sua sponte decided to reconsider defendant's motion for summary judgment as well. However, no motion for summary judgment for defendant existed at that time -- defendant's only motion for summary judgment was based upon res judicata and had been previously granted by the lower court, then reversed by this court.[4/] There were no assertions other than res judicata to support defendant's original motion,[5/] and after remand, defendant filed no new motions.

The trial court reviewed the briefs submitted by both parties and denied plaintiff's motion and granted summary judgment for defendant. The court noted that the judgment was final and that there was no just reason for delay. This judgment, too, was only a partial judgment in that it concerned only the constitutionality of the ordinance on its face and not as applied to plaintiff. Thus, the question of the constitutionality of the ordinance as applied to

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4/ See n. 3 and accompanying text, supra.

5/ Defendant had filed a motion in response to plaintiff's motion for summary judgment setting forth two reasons why plaintiff's motion should not be granted (see text). The portion of that pleading which requested summary judgment for defendant, however, was based only on the theory of res judicata.

plaintiff is still technically before the trial court.[6/]

This court is of the opinion that the court improperly granted summary judgment for defendant since no motion for summary judgment for defendant was pending. Therefore, the court only ruled on plaintiff's motion for summary judgment, which it denied. This left the issue raised in that motion (the constitutionality of the ordinance on its face) not fully disposed of. It left the issue in a position to be heard and tried on the merits.

Since the issue was not fully disposed of, this court has no authority to review the court's denial of plaintiff's motion for summary judgment. The fact that the lower court stated that the order was final and that there was "no just reason for delay" is of no consequence because the trial court was under the false impression that it not only had denied plaintiff's motion on the issue but had granted defendant judgment on the issue, thus fully disposing of the question. As we have stated, the court erred in that regard and the issue has, in fact, not been fully disposed of.

This court is remanding the case to the trial court for further proceedings in the case as it stood after the denial of plaintiff's motion for summary judgment. The court must, therefore, make a proper final determination with respect to the issue of the constitutionality of the ordinance as a whole. The trial court is also directed to determine the issue of the constitutionality of the ordinance as applied to plaintiff which is still pending before it.

6/ Since the trial court noted that there was "no just reason for delay", the matter ruled upon is properly before this court, although not all issues, specifically the constitutionality of the ordinance as applied, were disposed of by the lower court. Civ. R. 54(B).

A resolution of the latter issue is not susceptible to a summary judgment determination. As this court noted in its 1977 opinion, circumstances may have changed, particularly with regard to traffic patterns, which would warrant a different result than the related 1972 case.

Therefore, this cause is remanded for further proceedings. The trial court is directed to finally resolve all remaining issues in this case, carefully taking into account all relevant evidence.

This cause is remanded to the Common Pleas Court for further proceedings consistent with this opinion.

It is ordered that costs are to be divided equally between the parties.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

STILLMAN, P.J., _____

DAY, J., CONCUR. _____

_____

JUDGE

JOHN T. PATTON

For plaintiff-appellant: Robert J. Valerian,

For defendants-appellees. Thomas M. Kennedy, Jr.,
Asst. Law Director.

COPIES MAILED TO COUNSEL FOR ALL PARTIES. — COSTS TAXED.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

The State of Ohio, } SS.
CUYAHOGA COUNTY

I, GERALD E. FUERST, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and Records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from the Journal Ob 100 Pg 972 dated May 17 1979 - Case 39311 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal Ob 100 Pg 972 dated May 17 1979 and that the same is a correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 5th day of August A. D., 1983

GERALD E. FUERST, Clerk of Courts

By Eileen Demas Deputy Clerk

No. 82-1769

In the Supreme Court of the United States

October Term, 1982

LAKEWOOD, OHIO CONGREGATION OF JEHOVAH'S WITNESSES, INC.,
Petitioner,

vs.

CITY OF LAKEWOOD, OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Whether the 1973 Zoning Ordinance of the City of Lakewood, Ohio which permits only residential uses in the single-family use districts, but allows for regional public assembly, including churches, in other residential and use districts, prohibits the free exercise of a religious belief, on its face or as applied, in violation of the First Amendment to the Constitution of the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, Rules and Ordinances

Pertinent Zoning Sections in effect in 1975:

Text

No. 82-1769

In the Supreme Court of the United States

October Term, 1982

LAKEWOOD, OHIO CONGREGATION OF
JEHOVAH'S WITNESSES, INC.,
Petitioner,

vs.

CITY OF LAKEWOOD, OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS OMITTED FROM PETITION

Ohio Constitution, Art. XVIII, Section 3:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." (Adopted September 3, 1912.)

COUNTERSTATEMENT OF THE CASE

A. Proceedings Below

The Petitioner-Corporation filed a complaint in the U.S. District Court, Northern District of Ohio, Eastern Division on October 20, 1980, alleging that the Lakewood Zoning Ordinance adopted in 1973 was unconstitutional and that it was entitled to declaratory, injunctive and damage relief pursuant to Sections 42 U.S.C. 1983 and 42 U.S.C. 1988. The case was brought to issue and a motion was made by the Respondent-City for View of the Premises, which was not opposed and granted. The case was tried to the court on July 14 through July 17, 1981, and the Court viewed the premises on August 6, 1981. The trial court filed its Memorandum Opinion and Order and its Judgment on December 1, 1981, finding the Lakewood Ordinance to be constitutional under the First, Fifth, and Fourteenth Amendments to the United States Constitution. The Petitioner-Corporation *appealed* from the District Court decision to the United States Court of Appeals for the Sixth Circuit, *arguing only its First Amendment claim.* The Sixth Circuit affirmed the lower court decision on February 2, 1983. *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio,* 699 F.2d 303 (6th Cir. 1983). The Petition for Writ of Certiorari was filed on April 28, 1983.

B. Facts

The facial constitutionality of the Lakewood Zoning Ordinance was upheld by the Common Pleas Court of Cuyahoga County, Ohio on April 17, 1978, *Lakewood, Ohio, Congregation v. Lakewood,* 9 Ohio Op. 3d 314. Such case was remanded to the trial court upon appeal in an

unreported decision for resolution of all remaining issues: essentially, the constitutionality of the 1973 zoning ordinance as applied to the specific property in question in mid-1979. The within case began with the state court case still pending.

1. *Petitioner-Corporation; Religious Activities and Beliefs*

Members of the Petitioner-Corporation established themselves as an unincorporated association in the City of Lakewood in 1944. Since March 8, 1944, members have met and worshipped at their church, Kingdom Hall, which is located at 17526 Madison Avenue in the City of Lakewood, in an apartment district somewhat distant from convenience type commercial uses. The Lakewood Kingdom Hall has a capacity of 178 persons. This property was conveyed to the Petitioner-Corporation after it was organized and incorporated under the laws of the State of Ohio on or about June 19, 1972 (Trial Stipulations 2 and 3, App.[1] 31; App. 37, 72, and 268).

Members of Petitioner-Corporation are uniformly distributed throughout the City of Lakewood; residence within the City of Lakewood is a requirement of such membership and persons living outside Lakewood must associate with another congregation. They presently number about 103 and have weekly meetings at their Kingdom Hall on Tuesday at 7:30 P.M. for bible study, on Thursday at 7:30 P.M. for theocratic school and a service meeting, and on Sunday at 10:00 A.M. for a public lecture followed by a Watchtower Study. The goal of the Petitioner-Corporation is to grow to the size of about 150-175 and then divide into two congregations, each having the same

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1. "App." references are to the Joint Appendix filed with the U.S. Sixth Circuit Court of Appeals in the case below.

number of meetings utilizing the same Kingdom Hall. At some Kingdom Halls, there are three or more congregations holding the same number of meetings. In addition, members of the Petitioner-Corporation have home meetings on a weekly basis with attendance varying from eight to twenty-two. Baptisms are not conducted at the Kingdom Hall, but at a lake or coliseum (App. 239, 243, 255, 262, & 275-279).

Members of Petitioner-Corporation have no religious belief mandating location of their Kingdom Hall in a single-family residential district. In fact, Petitioner-Corporation's architect testified that a Kingdom Hall had been constructed in the mid-1970's in a Cleveland district similar to the Lakewood Madison Avenue site (*See* App. 220; Defendant's Exhibit K-1 through K-22; App. 73, 74). The distribution of literature on the street, house calls, and conducting in-home bible studies and training on how the bible relates to practical living in everyday life are the central tenets and missions of the Jehovah's Witnesses. Within Lakewood, such members make calls at all homes every two years (App. 238, 271-274).

2. *The City of Lakewood*

The City of Lakewood, a municipal corporation including territory of approximately 5.5 square miles, is an older residential community located west of the City of Cleveland, bounded by Lake Erie to the north and Rocky River to the west. The population of the City of Lakewood (69,160 in 1940; 66,154 in 1960; 70,173 in 1970; and 61,963 in 1980) increased somewhat during the 1960's due to a surge of new apartment construction, but declined during the 1970's principally due to smaller households (housing units increased 4.1% to 28,458 between 1970 and 1980).

The City of Lakewood, historically a city of homes located four to six miles from Downtown Cleveland, is almost completely developed. Although there are properties available for commercial or industrial use, just about all of the single-family lots are taken (App. 108, 163). These homes lie between, to the north of, and to the south of Madison and Detroit Avenues which run east and west across the entire breadth of the City.

3. *Subject Property and Neighborhood*

The property in question is a *small* wooded lot located at the southeast corner of Clifton and West Clifton Boulevards in the northwest sector of the City. It is surrounded by a residential neighborhood consisting of large single-family homes built over fifty years ago, for the most part. The frontage is approximately 135 feet on West Clifton Boulevard and 85 feet on Clifton Boulevard; due to curvature at the corner, the lot area is approximately 24,250 square feet. No parking is permitted on any of such frontage due to the prevailing traffic pattern in the area.

The subject property is located in a predominantly single-family (some two-family homes) residential area which is bounded by Rocky River on the west, railroad tracks to the south, Lake Erie to the north and extending east approximately one mile. To the south on the other side of the railroad tracks, in conformity with zoning, are multi-family properties, retail properties, the Lakewood Congregational Church, etc.; the railroad bridge actually divides the community leaving the single-family neighborhood, where the subject property is located, to the north, and the higher density property to the south (App. 38, 85, 93, 94, 289, & 290).

Horace Mann Junior High School, a public school, is located four or five houses south of the subject property

and Lincoln Elementary School, a public school, is located approximately one mile east of the subject property on Clifton Boulevard. These facilities are *local* places of public assembly with the primary *traffic* being *student-pedestrians;* student assignments to both elementary and junior high schools in Lakewood are made so as to be within walking distance (App. 92, 294, and 295).

Members of Petitioner-Corporation secured an option to purchase this property some time prior to January 5, 1972, and they exercised such option and made the purchase on or about June 6, 1972, notwithstanding the denial of their application for a special exception to build a church under the 1922 zoning code of Lakewood. The exception denial was sustained by the state courts (Trial Stipulations 4 and 5; App. 32, 33).

The Lakewood Board of Zoning Appeals denied the application on January 18, 1972 because:

> "1. Letter of objection from Chief of Police Joseph McMahon. The main objection is based on the traffic problem at the intersection.
>
> 2. Twelve of the immediate property owners objected on the basis of:
>
> a. Increased traffic
>
> b. Possible loss of property value
>
> c. Removal of property from tax duplicate
>
> d. A very small part of the congregation lives within a half-mile of the location."

On appeal the Cuyahoga County Common Pleas Court sustained the Zoning Appeals Board determination on November 27, 1972, because, *inter alia,* ". . . of traffic congestion with its incidents, hazards, and annoyances, and other reasons stated was under the substantial presence

in this case a reasonable application of the police power in behalf of the public safety and general welfare." (See Joint Exhibits E and E-1). On March 21, 1974 the Cuyahoga County Court of Appeals sustained the Trial Court decision. The Ohio Supreme Court denied certiorari on July 17, 1974.

4. *Zoning and Use History*

Prior to 1973, Sections 1111.02 and 1113.01 of the 1922 Lakewood Zoning Code defined the 1a residential uses applicable to the subject property (Trial Stipulation 6, Joint Exhibit F, App. 33). These sections are set forth in the Appendix to this Brief.

On July 2, 1983, the Council of the City of Lakewood adopted Ordinance No. 55-73, a completely new and comprehensive zoning code, which was later codified as Chapters 1101 through 1129 (Trial Stipulation 7, App. 33). As provided in Section 1103.01, entitled "Division into Districts", the City of Lakewood is divided into the following use districts which may be referred to by the letter and numerical designations indicated:

One Family District	R-1 District
One Family District	R-2 District
Two Family District	R-3 District
Multiple Family, Low Density	M-1 District
Multiple Family, Medium Density	M-2 District
Multiple Family, High Density	M-3 District
Business-Residential	BR District[2]
Office District	B-1 District
Retail District	B-2 District
Industrial District	X District
Flood Plane	FFP District

2. **BR use District established in 1976**

Prior to adoption of the 1973 Zoning Code, the subject property was located in a "group 1—residence class 1a" use district with permitted uses defined by Sections 1111.02 and 1113.01; after enactment of the 1973 Code, the use district including said premises was designated R-2, limited only to buildings and premises used, established, designed, arranged, and intended for only a one-family house (Trial Stipulations 7, 10, 11; App. 33, 34). At no time were churches or other places of public assembly permitted *per se* on the subject property.

Petitioner-Corporation's expert observed at trial that the present zoning map (Joint Exhibit M or O) fairly and faithfully reflects the uses that actually exist within the City of Lakewood with the exception that there is no use district reflecting the public schools constructed prior to the 1973 Code when such construction was judicially exempt from zoning (App. 167).[3]

There was no testimony or evidence offered at the trial court as to the percentage of land area assigned to various use districts or as to the appropriateness of any particular proportion of land area districted to any particular use in the City of Lakewood. There is no basis for Petitioner-Corporation's assertion that churches are permitted in only ten percent (10%) of the land area of the City. Such an assertion is problematical, in any event, since a good portion of land area, possibly twenty-five percent (25%), is actually utilized for streets, schools and parks, including Rocky River Metropolitan Park, located within the territorial limits of Lakewood.

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3. These facilities were installed at a time when the school board, a separate political entity, was not subject to zoning. In 1980, the law was changed by court decisions making the state and state agencies vested with eminent domain subject to zoning unless judicially excused. *Brownfield v. State*, 63 Ohio St. 2d 282 (1980) and *East Cleveland v. Board*, 69 Ohio St. 2d 23 (1982).

With reference to the zoning map in effect in 1975, when Petitioner-Corporation applied for their building permit leading to the present controversy (Joint Exhibit L, App. 321; Stipulation 15, App. 34), churches were permitted in the M-3 districts, located in the westerly portion of the City and from east to west along Madison Avenue, as well as in the B-1 and B-2 districts, located in the easterly portion of the City and from east to west along Detroit Avenue, pursuant to Sections 1115.02, 1117.02(C), and 1119.02(a) (App. 342, 350, and 351). Churches were also permitted in the M-2 medium density, multiple-family districts, located in the northeasterly and westerly sections of the City, as a special exception pursuant to Section 1113.04 (App. 340). The only requirement for granting the special exception was that no variance could be granted respecting required off-street parking. By definition, special exceptions are permitted uses and must be granted when the facts and conditions prescribed in the zoning code for the specific exception requested are found to exist by the Board of Zoning Appeals pursuant to Section 1101.30 (App. 327).

The zoning map in effect at the time of trial (Joint Exhibit M; App. 322), reflected the 1977 changes to the zoning code under which churches are permitted in Business Residential, BR, and Retail, B-2, districts provided the conditions set forth in Section 1123.14 (App. 238) are met. The B-2 district is located along the entire east-west breadth of the City on both Detroit and Madison Avenues.

At all times, the area available for church use has been substantially more than ten percent (10%). Furthermore, there are properties available for church use in Lakewood in close proximity to the single-family districts (App. 103, 123).

Historically, many churches of many different faiths are located in the City of Lakewood, primarily along Madi-

son and Detroit Avenues in close proximity to the residential areas of the City. A few churches constructed prior to the 1973 Code are scattered at various points in the City (App. 168, 169; App. 124, 125).

5. *Church and Residential Use*

Churches, although they may have been thought of as local neighborhood facilities and places walked to by their members, in modern times have become regional places of public assembly requiring considerable off-street parking, as do various other places of public assembly. The church or public assembly use involves the coming or going of large crowds with great frequency, *i.e.*, daily or several times weekly, for a multitude of purposes. The persons involved are often unassociated with the church, and, more often than not, strangers in the neighborhood where the church is located. An atmosphere of heavy traffic, noise, intrusions upon privacy, and intrusions on open spaces is created when the church is located in single-family residential neighborhoods. Church uses include church services, funerals, weddings, music, singing, choir practice, bingo games, car raffles, fish frys, bake sales, dinners, dances, sports activities, special speakers, bazaars, carnivals, rummage sales, ice cream socials, rental of places of assembly for use by outside groups, *e.g.*, Alcoholics Anonymous, Boy Scouts, Boards of Education, day care centers, special lectures, etc. (App. 147, 157, 178-184; App. 84, 92; App. 263, 264 and 266). As indicated above, Petitioner-Corporation's members assemble several times a week at their Kingdom Hall.

The single-family residence use, on the other hand, very rarely involves assembly of large numbers of persons. Gatherings of 25 persons at a home may occur once a year on the average and gatherings among three or more homes of 100 persons or more occur even less frequently, *e.g.*, a graduation party (App. 185; App. 216, 271; App. 150, 151; App. 206).

There is a limited market for the resale of a church. Churches are occasionally sold to another church or for a place of public assembly, such as a playhouse, because these are the only uses for which such buildings can be readily adapted (App. 184; App. 109, 110; App. 284). There is no religious belief of the members of Petitioner-Corporation that prevents rental or sale of their Kingdom Hall premises (App. 279).

6. *Impact of Placing Church or Similar Use at Proposed Site*

The neighbor to the south of the proposed site, a project engineer familiar with construction and the plans involved here, testified that the placement of the proposed structure would be no different from having a bank, movie theater, office or medical building next to his home, and that it would depreciate the value of his home in the range of twenty-five to thirty percent (25-30%); he paid $105,000.00 for his home (App. 201-206). Homes in the neighborhood were described by Petitioner-Corporation's architect as "turn of the century homes" and "elegant".

The proposed parking spaces for the Kingdom Hall are within two feet of the easterly property line (Joint Exhibit I), and the easterly property owner's home is four feet from the property line (App. 211). Cars would be parked within six feet o the neighbor's home along its entire depth dimension and into the backyard of such easterly property. Petitioner-Corporation's own expert witnesses testified that there should be a break or barrier between the church use and surrounding residential properties by trees, bushes, or some sort of barrier (App. 189, 190), and that a parking lot directly adjacent to any single-family residential property would have a detrimental effect, causing a market value decrease (App. 211-286).

Such measures as barriers and screening would be impossible under the proposed development because parking is within two feet of one property line and within seven feet of the other property line. The lot is obviously too small for the use proposed by the Petitioner-Corporation.

The City of Lakewood is substantially built up. There is absolutely no vacant site on which to put a church in the residential neighborhoods unless there is a demolition of the existing properties. Limiting churches to the multi-family residential and other use districts, where there are plenty of locations for churches in close proximity to the residential areas, was most appropriate in the opinion of one city planner. He further indicated that constant parking of many vehicles on a residential street is something neither expected nor desirable in a residential environment. Owners of residential properties should not have to resort to tactics such as placing their own cars in the street in front of their homes so as to reserve a space for their guests (App. 123-128). With the proposed church use, 70% of the site would be devoted to buildings, parking spaces, drives and sidewalks as compared to 40% of the site area dedicated to such uses for three residential lots. Intensity of development on a site is a factor always taken into account in establishing uses and zoning regulations for a community (App. 130-133). The subject property is not large enough to accommodate the church proposed (App. 139).

Uncontroverted testimony at the trial court established that placement of a church, or any building to be used as a regional place of public assembly, at the proposed site would cause diminution in property values to the surrounding properties and the neighborhood. Such use would cause a chronic overflow parking problem in the neighborhood. The public assembly use, involving the

coming and going of large crowds in great frequency, *i.e.*, daily or several times weekly, by persons being more often than not strangers in the neighborhood, would result in the creation of an atmosphere of heavy traffic, noise, fumes, intrusions upon privacy, and intrusions upon open spaces in the existing residential environment (App. 87-89; App. 298, 299; App. 212-216, 218; App. 153-158; App. 205-209). The overflow parking problem that would be created was well demonstrated by the examples of a local church and occasional use of the local school for PTA meetings, etc. (App. 300-305; App. 295-299).

REASONS FOR DENYING THE WRIT

Introduction

In seeking to persuade this Court to accept this case for review, Petitioner-Corporation grossly overstates and exaggerates its case.

The feature of the Lakewood zoning ordinance wherein the most frequent and heavier population density, traffic, noise, and privacy invading uses, including churches, are excluded from single-family districts and assigned to apartment and other use districts does not present an issue new or unique to the Court. In the landmark case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the zoning ordinance upheld established six districts, churches not being specified as permitted in the first two which were restricted for single-family and two-family residences, public parks, water towers and reservoirs, passenger stations, farming, nurseries and truck gardening; churches were permitted in the third class which also included apartments, hotels, and various public and community buildings. Contrary to Petitioner-Corporation's assertion, the constitutionality of the Lakewood and Euclid-

type zoning provisions has not been held in abeyance from the time of *Euclid v. Ambler Realty Co., supra. See Corporation of Presiding Bishop v. Porterville*, 90 Cal. App. 2d 656, 203 P.2d 823 (1949), *appeal dismissed for want of a substantial Federal question*, 338 U.S. 805, *reh'g denied*, 338 U.S. 939 (1950), where the very question presented here was decided by upholding the constitutionality of such an ordinance.

In the case of *Minney v. Azusa*, 164 Cal. App. 2d 12, 330 P.2d 255 (1958), *appeal dismissed*, 359 U.S. 436 (1959), also involving a Jehovah's Witnesses Congregation, the court rejected contentions and arguments based on the assertion that churches were excluded from 90% of the area of the city which were only surmised, as in the within case, by counsel from mere observations of a zoning map and without the aid of any testimony explaining and applying the facts to the entire circumstances of the city.

Petitioner-Corporation appears to intimate that there was prejudice on the part of the City respecting the 1972 proceedings (not before the Court) and passage of the comprehensive 1973 zoning ordinance and that the growth of its congregation has not expanded as a consequence. However, the 1972 decision under the old zoning code, set forth at length above, was sustained upon appeal to the Cuyahoga County Common Pleas Court, the Eighth Ohio Judicial District Court of Appeals, and the Ohio Supreme Court. In addition to the observation of Petitioner-Corporation's expert that the new zoning map fairly and faithfully reflects uses that actually exist, the District Court found in its conclusions of law as follows:

> "On its face, the zoning ordinance does not discriminate against religion as a whole or against the Jehovah's Witnesses in particular. The part of the zoning ordinance listing permitted uses in R-2 districts classifies

> on the basis of the use of the land and distinguishes between single-family residential use and all other uses—whether multiple-family or non-residential. The ordinance does not single out churches as an impermissible use, but disallows them along with all other institutions, secular and sacred, profit and non-profit . . . No evidence was introduced in the instant case to show that the ordinance has been applied in a manner that discriminates against churches in general or the Jehovah's Witnesses in particular . . . The congregation has not demonstrated that the purpose or effect of the R-2 zoning ordinance is to discriminate against religion or the Jehovah's Witnesses . . . The court finds that the classification is designed to control population density within the district, and is rationally related to the legitimate governmental purpose of regulating municipal growth, curtailing traffic, reducing noise, and enhancing the aesthetic properties of the area." (Op. 7, 8, 9, App. 043-045; Petition p. 18a.)

Lack of growth of a congregation which confines its membership to the 5.5 square miles of the City of Lakewood can be explained by a number of factors: *e.g.*, the presence of many other long-established churches of many different faiths within the same City, the decline of the City's population from 70,173 to 61,963 over the last ten years, and growth and expansion of newer suburbs to the west.

1. The Court of Appeals Correctly Applied Well Established Constitutional Standards to the Facts of This Case.

It is well recognized that the attainment of a quiet place where yards are wide, the people few, and motor vehicles restricted, is a reasonable goal of land use legis-

lation and a clearly valid exercise of police power. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pritz v. Messer*, 112 Ohio St. 628 (1925); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In *Village of Belle Terre*, Justice Douglas, historically one of the most avid advocates of the First Amendment, referred to single-family districts as a "sanctuary for people", as distinguished from judicially approved bird, wildlife and other sanctuaries created for non-human creatures:

> "A quiet place where yards are wide, people are few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . the police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out *zones where* family values, youth values, and *the blessings of quiet seclusion and clean air make the area a sanctuary for people.*" (Emphasis added). *Id.* at 9.

The permitting of uses in a use district where they are not permitted or are otherwise inappropriate has been depicted as "spot zoning" and the taking of property rights without "due process of law". *See* 58 O. JUR. 2d 107, *Piecemeal, Block, or Spot Zoning; Willot v. Beachwood*, 175 Ohio St. 557 (1964); *Walker v. Belpre*, 14 Ohio App. 2d 17 (1967); *White v. Cincinnati*, 101 Ohio App. 160 (1956); *Clifton Hills Realty Co. v. Cincinnati*, 12 Ohio Op. 418 (1938). Although the Constitution does not explicitly mention any right of privacy, a line of decisions has recognized that a right of personal privacy does exist under the Constitution. Personal rights deemed fundamental or implicit in the concept of ordered liberty are included in this guarantee of personal privacy. *See Roe v. Wade*, 410 U.S. 113, 152 (1973).

Courts have upheld as a valid exercise of police power the validity of ordinances that exclude churches from cer-

tain types of residential zones, but permit churches in other residential and use districts notwithstanding assertion of First Amendment rights. *See Presiding Bishop v. Porterville, supra; Minney v. Azusa, supra; Matthews v. Board of Supervisors,* 203 Cal. App. 2d 800, 21 Cal. Rptr. 914 (1962); *Miami Beach United Lutheran Church v. Miami Beach,* 82 So. 2d 880 (Fla. 1955); *State ex rel. Lake Drive Baptist Church v. Bayside Board of Trustees,* 12 Wis. 2d 585, 108 N.W.2d 288 (1961). This view is recognized as the correct and enlightened position to be taken by state courts. *See e.g.,* in *State v. Cameron,* 184 N.J. Super. 66, 445 A.2d 75 (1982), where the court recognized that the Supreme Court's dismissal of *Presiding Bishop v. Porterville, supra,* for want of a substantial federal question was a disposition on the merits that lower courts must follow, citing *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 101 Sup. Ct. 2882, 2888 (1981).

In *Jewish Reconstructionist Synagogue etc. v. Roslyn Harbor,* 38 N.Y.2d 283, 379 N.Y.S.2d 747 (1975), *cert. denied,* 426 U.S. 950 (1976), it is actually the dissenting opinion, not the quotations relied upon by Petitioner-Corporation, that speaks for the majority of the three judge panel. The second judge concurred only in the result, and indicated agreement with the dissenting opinion that New York should approach the position taken in *Presiding Bishop v. Porterville. Id.* at 756-57. *Jewish Reconstructionist Synagogue, supra,* approved a setback variance whereby an existing building was allowed to be used as a synagogue, 106 feet away from the nearest home instead of 125 feet as required by the ordinance.

The cases cited by Petitioner-Corporation in support of their position, for the most part: were decided or based upon cases decided at an earlier time; dealt with situations where the legislature determined that churches should be permitted by special exception; included circumstances

leading to a determination that exclusion at the sites in question was unreasonable; and included *dicta* or implications to the effect that churches may not be totally excluded from residential zones. *See, e.g., State ex rel. Synod of Ohio v. Joseph,* 139 Ohio St. 229 (1942). Modern customs and the advent of an explosion in the use of motor vehicles and mobility have transformed the modern church into a place of regional public assembly, however, with all the characteristics thereof and many aspects of commercialism. Modern churches attempt to use their facilities almost all of the time, seven days a week.

State courts reviewing conditional use permit or special exception cases have also affirmed the prohibition of church use in residential districts. *See Milwaukee Congregation of Jehovah's Witnesses v. Mullen,* 330 P.2d 5 (Ore. 1958), *cert. denied,* 359 U.S. 436 (1959); *St. James Temple v. Board of Appeals of the City of Chicago,* 100 Ill. App. 2d 302, 241 N.E.2d 525 (1968); *West Hartford Methodist Church v. Zoning Board of Appeals,* 143 Conn. 263, 121 A.2d 640 (1956); *Galfas v. Ailor,* 81 Ga. App. 13, 57 S.E.2d 834 (Ga. App., 1950). In *Milwaukee Congregation, supra,* the court upheld the constitutionality of a special permit to erect a church on a 100 foot by 100 foot lot in a single-family district on the grounds that the church use would create traffic congestion. The denial of the building permit did not prohibit any one of the congregation's members from exercising their religious beliefs.

In the within case we do *not* have: property including 31½ acres, 600 foot frontage by 2300 foot depth plus extra frontage as in *State ex rel. Anshe v. Bruggemeier,* 97 Ohio App. 67 (1953); a site in the vicinity of a Masonic Temple and several multi-family dwelling structures, including 300 foot frontage, a depth of 163 feet and a congregation of persons located nearby having a religious be-

lief that they must walk to their place of worship as in *Young Israel Organization of Cleveland v. Dworkin,* 105 Ohio App. 89 (1956); or a lot in close proximity to a telephone exchange building and an apartment house having space sufficient for 60 automobiles in an undeveloped community with the site having frontage on three fifty foot streets as in *State ex rel. Synod v. Joseph, supra.*

The cases on this subject, whether favoring or striking down the ordinance or conditional use permit denial, have been decided on the basis of what is reasonable under the standards set forth in *Euclid v. Ambler Realty Co., supra.* Where ordinances were held unconstitutional, the generally-stated reason given was that the absolute prohibitions sought to be upheld were found to bear no substantial relation to the public health, safety, morals, or general welfare of the community, never upon application of the theories suggested by Petitioner-Corporation. *See City of Englewood v. Apostolic Christian Church,* 146 Colo. 374, 362 P.2d 172, 175 (1961).

The free exercise of religion is infringed when a seemingly neutral state regulation forces an individual to choose between violating his religious principles and subjecting himself to a government-imposed penalty or forfeiting a governmental benefit. *See Wisconsin v. Yoder,* 406 U.S. 205 (1972) and *Sherbert v. Verner,* 374 U.S. 398 (1963). The burden of proof is on the individual who asserts that a valid and neutral law of general applicability should not be enforced on the ground that the law prescribes (proscribes) conduct his religion proscribes (prescribes). *United States v. Lee,* ..... U.S. ....., 50 U.S.L.W. 4201 (1982).

At best, Petitioner-Corporation's witnesses testified about a desire to move from their present Kingdom Hall to the site in question because it would be more pleasant or aesthetically more pleasing; this desire, not a religious belief, is a desire that might be shared in common with

any individual or secular group. *See* Trial Court Opinion, pp. 27a, 28a in Appendix to Petition. Because of Petitioner-Corporation's failure to demonstrate infringement of any religious belief by reason of the Lakewood Ordinance on its face or as applied, the U.S. Sixth Circuit Court of Appeals and the Trial Court correctly determined that the remaining tests and standards prescribed by *Sherbert v. Verner, supra,* need not be applied or considered.

2. There Is No Substantial Federal Question Presented and There Are No Special or Important Reasons for Review of This Case by the United States Supreme Court.

Rule 19 of the Rules of Supreme Court of the United States provides, in part, that:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered; . . .
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

As demonstrated above, the case is not one which involves any federal question of substance which has not heretofore been decided by this Court, nor was the decision below in any way not in accord with applicable decisions of this Court. *See Euclid v. Ambler Realty Co., supra; Corporation of Presiding Bishop v. Porterville, supra;* and *Minney v. Azusa, supra.* In addition, there is no conflict presented here with a decision of another court of appeals or with any state or territorial law on an important state or territorial question, and there is not here involved any departure from the accepted and usual course of judicial proceedings so as to call for an exercise of the Court's power of supervision.

Petitioner-Corporation has presented no other special or important reasons for review by this Court and none exist. Indeed, the unique nature of this case weighs heavily against the issuance of the writ sought by the Petitioner-Corporation.

Petitioner-Corporation avoids the hard facts of the within case, presenting the case from a general point of view. Members of the Petitioner-Corporation have enjoyed public worship in a Kingdom Hall directly adjacent to a single-family neighborhood in Lakewood since 1944. They wish to construct a new Kingdom Hall on a lot too small in a strictly single-family district already judicially determined as being inappropriate for the proposed use. We are not dealing with a large property which would be susceptible to adequate screening, landscaping, side yard, type regulations; Petitioner-Corporation proposes parked cars two feet from the property line and six feet from the house of their easterly neighbor, violation of existing set back requirements, and an inadequate number of parking spaces calculated to cause a chronic overflow parking problem in the neighborhood (37 spaces instead of

the 49 required for a seating capacity of 195) (*See* App. 63 to 78).

Petitioner-Corporation has no constitutional rights or claims as a citizen or person respecting freedom of religion, except as may be asserted on behalf of its members, and the members thereof cannot claim any infringement upon the free exercise of their religious beliefs. *See Northwestern National Life Co. v. Riggs,* 203 U.S. 243 (1906); *Western Turf Assn. v. Greenberg,* 204 U.S. 359 (1907); and *NAACP v. Button,* 371 U.S. 415 (1963). Corporations obviously do not have and do not exercise religious beliefs.

Assuming arguendo that there was an infringement, the zoning ordinance in question is nothing more than a "time, place and manner" regulation and a valid exercise of the police powers of the city or the state with respect to the exercise of First Amendment rights, whether they be freedom of speech or religion. *See Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Braunfeld v. Brown,* 366 U.S. 599 (1961); *Heffron et al. v. International Society for Krishna Consciousness, Inc.* 452 U.S. 640 (1981); *Young v. American Mini Theaters,* 427 U.S. 50 (1976); *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974). In *Braunfeld v. Brown,* this Court's rejection of the appellant's argument to impose an exemption for his benefit from the "Sunday closing law" can hardly be considered as examining a proposal for a less intrusive means, as characterized by Petitioner-Corporation (Petition page 25) 366 U.S. at 608-609. The quest for such an exemption was at the heart of the *Braunfeld* case, just as it was at the heart of the *Heffron et al.* case, *supra,* and is really what the Petitioner-Corporation is after here. This quest for a special exemption, has been, and should continue to be rejected.

In *Young v. American Mini Theaters, supra,* there was no doubt that a municipality could control the location of

theaters, a First Amendment use, as well as the location of other establishments, by confining them to specified zones or requiring them to be disbursed throughout the city.

There are no logical and realistic less restrictive means for accomplishing the constitutional ends of the ordinance here examined, especially since the inquiry must take into account not only the Petitioner-Corporation and its customs and beliefs, but those of other persons and organizations that would be entitled to establish buildings in single-family residential districts in the City, not only for church purposes, but for all purposes involving public assembly for the exercise of free speech or expression of a religious belief. If the regulation is held invalid respecting Petitioner-Corporation, how could it be held valid as to the establishment of places of public assembly in single-family districts by other social, political, religious or charitable organizations. Counsel for the Petitioner-Corporation agrees that the same constitutional principles are to be applied to *all rights* guaranteed under the First Amendment. *See also Heffron v. International Society for Krishna Consciousness, supra*, 450 U.S. at 653. Means such as penalizing disorder or disruption, commercial uses, etc. by regulation will not adequately deal with the problems posed and in fact might constitute means more intrusive, *e.g.*, regulating the times and purposes for which church associations shall meet.

The facts which make up the within record, in an event, are in many respects unique and, for the reasons stated, are not general as suggested by the Petitioner-Corporation. Review of this case would, therefore, be limited and turn on the specific factual considerations presented herein and would have little, if any, general application or impact.

CONCLUSION

In conclusion, Respondent respectfully submits that the Writ of Certiorari prayed for in this action should be denied, because:

(1) No substantial federal question for resolution is presented in this action;

(2) The decision below rests in large part on long established law found in the decisions of this Court;

(3) The decision below turns upon facts so unique that any decision of this Court would have little precedential value.

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APPENDIX

CITY OF LAKEWOOD 1922 ZONING CODE PROVISIONS

1111.02 Group 1—Residence Classes; Class 1a Uses, Dwelling.

(1) Dwelling.

(2) Church, school, public library, public museum.

(3) Community center building, private club, except a club the chief activity of which is a service carried on as a business, philanthropic or eleemosynary use or institution other than a penal or correctional institution. (Ord. 4795. Passed 1-7-52).

(4) All public buildings or premises and public use of buildings or premises excepting as provisions specifically applicable thereto are otherwise made in this chapter. (Ord. 17-55. Passed 3-7-55).

(5) Railway passenger station, railway right-of-way, not including railway yards.

(6) Farming, greenhouse, nursery, truck gardening. (Ord. 4795. Passed 1-7-52).

1113.02 Dwelling.

In a class 1a district no building or premises shall be used and no building shall be erected which is arranged, intended or designed to be used for a class 1a, 2a, 3a, 3b and 3c use. In a class 1a district no building shall be erected which is arranged, intended or designed to be used, except for a class 1a use. In a class 1a district no building shall be erected which is arranged, intended or designed

for a use enumerated in subdivision (2) or (3) of class 1a uses, unless such building is located:

(1) On a lot already devoted to a use enumerated in said subdivision.

(2) On a lot fronting on a portion of a street between two intersecting streets in which portion there exists a building of a kind enumerated in said subdivisions.

(3) On a lot immediately adjacent to or across the street from a public park or public playground.

(4) On a lot fronting a street having street car tracks therein opposite such lot.

(5) On a lot fronting on a portion of a street between two intersecting streets in which portion there exists a building devoted to a non-conforming use.

(6) On a lot immediately adjoining or immediately opposite on the other side of the street from a 2a, 2b, 3a or 3b district; or

(7) On a lot approved after public notice and hearing by the Board of Zoning Appeals. (Ord. 1786. Passed 2/13/22).

No. 82-1769

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LAKEWOOD, OHIO CONGREGATION
OF JEHOVAH'S WITNESSES, INC.,
Petitioner,

v.

CITY OF LAKEWOOD, OHIO,
Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION

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REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION

The case before this Court frames a constitutional question of monumental importance. In its attempt to dissuade this Court from granting the writ of certiorari, the City argues that the factual setting of this case is "so unique" as to prevent a decision of this Court on the merits from having any genuine precedential value; that the decision below is supported by "long established law" as announced by this Court; and that no substantial federal question is presented. However, the record before this Court proves otherwise.

A. The Issue In This Case Is The Extent To Which A City May, By Ordinance, Prohibit The Use of Property For Public Worship.

The City inaccurately characterizes this case as concerning nothing more than a minor dispute resulting from a landowner's attempt to build a too-large structure on a too-small piece of real estate and to intrude thereby upon the privacy of adjoining landowners. The very nature of the ordinance which the City seeks to defend prevents it from being so classified. This is because the City's ordinance does not *regulate* the religious use of buildings to be located in residential areas: it *prohibits* such use. Given this prohibition, neither the size of this particular lot, the distance of the proposed church from adjoining properties, nor any other fact relating to this particular parcel of property has any relevance at all. No matter what the facts are relating to the Congregation's real property, they cannot make any difference; the City's ordinance, prohibiting it as it does any use of any property located in a single-family residential district for a church under any circumstances, squarely raises the issue of the extent

to which cities may constitutionally enforce such zoning ordinances.

The issue raised herein is confronted on a daily basis by zoning authorities in cities, towns and villages in every state in this nation, each of which is required to interpret for itself the reach of the First Amendment. While the great majority of state courts which have decided this issue have concluded that local zoning authorities may not prohibit churches in residential districts, it is apparent that state supreme courts have varying views with respect to the First Amendment issue. Given the state of the law, there have been hundreds of cases[1] in which this issue has been litigated and it is impossible to claim, as the City does, that a decision by this Court herein would have no precedential value.

The practical effect of a decision by this Court would be far reaching, for it would essentially eliminate the duplicative litigation on this issue presently pending in state courts throughout this country.[2] Moreover, the determination by this Court of this critical First Amendment issue would significantly reduce the delays experienced by religious congregations which must en-

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[1] *See, inter alia,* Curry, James E., *Public Regulation of the Use of Land* (1964) (listing 248 cases to date of publication); and cases collected in Anderson, Robert M., *American Law of Zoning* 2d (2d Ed. 1976) § 12.18 *et. seq.; Annot.,* 74 ALR 2d 377 (1960); Rathkopf, Arden H., *The Law of Zoning and Planning,* Vol. II (4th Ed. 1981) § 20.01 *et. seq.;* and Rohan, Patrick J., *Zoning and Land Use Controls* (1978 and Supp. 1981), § 305[4][a] et. seq.

[2] In the absence of a definitive standard of review from this Court, such litigation has resulted in inconsistent and even contradictory results from state to state. *Compare American Friends of the Society of St. Pius Inc. v. Schwab,* 68 A.D. 2d 646 (N.Y. App. 1979) and *Matter of Islamic Society of Westchester and Rockland Inc.,* N.Y.L.J., 7-18-83, p. 17, col. 6, —— A.D. 2d ——, —— N.Y.S. 2d —— (1983) with *State v. Cameron,* 184 N.J. Super. 66, 445 A.2d 75 (N.J. Super. Ct. App. Div. 1982).

gage in lengthy and expensive battles to secure their First Amendment rights. Such delay is, unfortunately, typical.[3] *See, e. g., Int'l Society of Krishna Consciousness, Inc. v. City of Evanston, Illinois,* 368 N.E. 2d 644, at 653 (Ill. App. 1977). ("Although plaintiff has tried to secure a permit for five years, the record before us reflects a case still in its earliest stages.")

Contrary to the contention of the Respondent, the

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[3] The Congregation first sought a building permit for its church in 1972, eleven years ago, pursuant to a provision for a "special exception" contained within an ordinance since repealed. That permit was denied on the grounds that a temporary traffic hazard existed. The Congregation unsuccessfully appealed this initial refusal to the state trial court and court of appeals, the latter of which stated:

> It is recognized that an ordinance which would prohibit the construction of churches in single family residential districts would be unconstitutional. *Israel Organization v. Dworkin* (1976), 105 Ohio App. 89. . . .

Lakewood Congreg. of Jehovah's Witnesses v. City of Lakewood, Ohio, Case No. 32386 (8th Dist. Ct. Apps., 1974).

Before the abatement of this traffic hazard, the City enacted the present ordinance. [Respondent's Brief erroneously states that the present Lakewood zoning ordinance was adopted in 1983. Resp. Brief at 7. The ordinance was enacted in 1973]. Thereafter, when the Congregation again applied for a building permit, the City told the Congregation that not only was its property no longer usable for a church by reason of the new ordinance, but that the City's prior denial—albeit made at a time when a temporary traffic hazard existed—was still binding.

The Congregation appealed the City's final determination in 1975. On two occasions, the trial court dismissed the complaint; each time, the Congregation appealed, and in each instance the appellate court reversed and remanded the matter. The last such remand occurred on May 17, 1979, at which time the trial court was instructed to determine the case on its merits. Almost one and one-half years later, the state trial court had still not taken any further action, and it was at that juncture that the Congregation filed this case in the United States District Court for the Northern District of Ohio.

only unique aspect of this case is the extent to which Lakewood has restricted the free exercise of religion by prohibiting religious uses in almost 90% of its area.[1] Although other cities have restricted churches from some areas of their territory or required special use permits as a prerequisite to construction of a church, seldom has a municipality enacted an ordinance so broad in its effect that it all but excludes religious uses from a city. The Sixth Circuit's decision is an invitation to other municipalities to follow Lakewood's lead in substantially or completely prohibiting religious uses within their boundaries. Whether such prohibition can be reconciled with the right to the free exercise of religion guaranteed by the First Amendment presents a federal constitutional question worthy of review by this Court.

B. This Case Presents A Substantial Federal Question Which Has Not Been Decided In Accordance With The Correct Constitutional Standards.

The City further asserts that the Court of Appeals correctly applied "well established constitutional standards," and that, therefore, "there is no substantial federal question presented." That this case presents a substantial federal question cannot reasonably be denied, although the City nonetheless so denies. To that end, the City argues that this Court's summary dismissal, over thirty years ago, of the appeal taken in *Corporation of Presiding Bishop v. Porterville,* 90 Cal. App. 2d 656, 203 P.2d 823 (1949), *app. dism'd.,* 338 U.S. 805, *reh'g den.,* 338 U.S. 939 (1950), mandates that conclu-

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[1] While the City is unwilling to accept Petitioner's characterization that churches are excluded from almost 90% of the City, the Sixth Circuit apparently was satisfied that such was the fact. 599 F.2d at 305 (Pet. App. 4a.)

sion. *See* Resp. Brief, at 14, 17 and 21. This conclusion can only result from Respondent's misapprehension of this Court's present view of the precedential effect of summary dispositions.

In *Hicks v. Miranda,* 422 U.S. 332 (1975), this Court held that lower courts are indeed bound by its summary actions on the merits, but recognized that "ascertaining the reach and content of summary actions may itself present issues of real substance," *id.*, 422 U.S. 345, n.14, and that doctrinal developments occurring since the date of the summary disposition may well militate in favor of the opposite result.

In the eight years since *Hicks v. Miranda,* this Court has consistently taken the position that "summary dispositions . . . extend only to the 'precise issues presented and necessarily decided by those actions,'" *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 496 (1981), quoting *Mandel v. Bradley,* 432 U.S. 173, 176 (1977), and that "[t]he precedential significance of the summary action . . . is to be assessed in the light of all of the facts in the case." *Id.,* 432 U.S. at 177. This Court has thus emphasized that "[a] summary disposition affirms only the judgment of the court below . . . and no more may be read into [the Supreme Court's action] than was necessary to sustain that judgment." *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 182-83 (1979).

Corporation of Presiding Bishop was decided, in part, on a very narrow ground: the plaintiff was not a religious congregation but a "corporation sole, the existence of which depends upon the law of the State," and therefore, its enjoyment of property rights was "subject to reasonable regulations," *id.,* 203 P.2d at 825. Thus, there is a significant factual disparity between *Corporation of Presiding Bishop* and the instant case, and it is not at all clear that this Court's summary disposition of *Corporation of Presiding Bishop*

over thirty years ago can or should control.[5] More importantly, major doctrinal developments have occurred in the interim, not the least of which is the development of the "strict scrutiny test," *see, inter alia, Sherbert v. Verner,* 374 U.S. 398 (1963); *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *McDaniel v. Paty,* 435 U.S. 618 (1978), and *Thomas v. Review Board of Indiana Employment Security Div.,* 450 U.S. 707 (1981). The development of the law of "strict scrutiny" and this Court's consistent application of it to First Amendment cases must constitute a significant enough doctrinal development to foreclose the according of any further precedential value to its summary disposition of *Corporation of Presiding Bishop.*

Respondent's misunderstanding as to the continuing efficacy of *Corporation of Presiding Bishop* extends also to *State v. Cameron,* 184 N.J. Super. 66, 445 A.2d 75 (N.J. Super. Ct. App. Div. 1982). Contrary to Respondent's claims, *see* Resp. Brief, at 17, the *Cameron* court, after first tracing the development of the law of summary disposition since *Hicks v. Miranda,* acknowledged that *Corporation of Presiding Bishop* is *no longer controlling,* by reason of interim legal and doctrinal changes, and that commentators agree that the majority of states hold the exclusion of churches from residential zones to be impermissible, *id.,* 184 N.J. Super. at 80.

Of course, the most compelling reason for concluding that *Corporation of Presiding Bishop* has no continuing efficacy is that the great weight of American law is to the contrary, *see* Pet. Brief, at 9, nn.7 and 8. State courts have considered themselves free to reach their own conclusions as to the impact of the First Amend-

[5] Neither the trial court nor the Sixth Circuit herein appears to have even considered the possibility that *Corporation of Presiding Bishop* controlled, as neither lower court as much as cites to the earlier case.

ment on the right of local authorities to regulate the religious use of land. Those courts have generally concluded that churches may not be excluded from residential areas, either on the basis that such an exclusion could not bear a substantial relation to the general welfare and thus would run afoul of the *Euclid* test,[6] or on the basis that such an exclusion would abridge the First Amendment guarantee of free exercise.[7] But whether state courts have resolved the issue correctly is not nearly as important as the fact that the meaning of the First Amendment is a *federal* constitutional question, properly determined by this Court, which is the final arbiter of such questions.

Until the decisions of the courts below in this case, there was still no *federal* case determining this issue. Consequently, the decision of the Sixth Circuit Court of Appeals is presently viewed as *the* definitive articulation of the state of the law of the First Amendment's Free Exercise Clause,[8] and will continue to be so viewed until this Court determines the law.

The Congregation believes that the Sixth Circuit's decision is erroneous, and that its illegal inquiry into, and weighing of religious beliefs of the Congregation, coupled with its refusal to apply the strict scrutiny test, contravene the First Amendment decisions of this Court. This Court has already held that where a zoning ordinance invades or burdens a First Amendment right, that ordinance must be subjected to the strict scrutiny test. In *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61,

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[6] *See, e. g., State ex rel Synod of Ohio of United Lutheran Church in America v. Joseph,* 139 Ohio St. 229, 39 N.E. 2d 515 (1942).

[7] *See, e. g., Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor,* 38 NY 2d 283, 342 N.E. 2d 535 (1975) *cert. den.,* 426 U.S. 950 (1976).

[8] *See, e. g., Zoning and Planning Law Report,* Vol. 6, No. 5 (May, 1983) (identifying the decision of the Sixth Circuit Court of Appeals as "a case of first impression in the federal courts").

at 68 (1981), this Court stated: "When a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest [footnote omitted]." *See also, Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 62 (1976).

This Court has already applied the strict scrutiny test to zoning ordinances defining a "family," *Moore v. City of East Cleveland,* 431 U.S. 494 (1977); excluding live entertainment in the form of nude dancing, *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61 (1981); dispersing adult movie theatres, *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); and excluding billboards, *Metromedia Inc. v. City of San Diego,* 453 U.S. 490 (1981). The application of the strict scrutiny test to zoning ordinances excluding places of public worship from some or all of a municipality is equally mandated by the First Amendment.

The "substantial relation" test of *Euclid* is an insufficient safeguard against the exercise by local zoning authorities of nearly unbridled discretion to prohibit the religious use of land. Prejudices against particular religious groups, or all religious groups in general, can readily be veiled in the guise of concern for noise, open space, traffic and the like, any of which can be seized upon as a ground for exclusion. That this is a real danger has already been recognized by other courts. In *Matter of American Friends of the Society of St. Pius, Inc. v. Schwab, et al,* 68 A.D. 2d 646, 649 (N.Y. App. Div. 2d Dep't 1979), the court said:

> It is noteworthy that, in speaking of the "constitutional prohibition against the abridgement of the free exercise of religion," the court recognized and paid deference to "the public benefit and welfare which is itself an attribute of religious worship in a community." *Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential*

> *neighborhood, tend to avoid any appearance of an antireligious stance* and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area.

(Emphasis supplied.)

The court's conclusion in *Schwab* is apt and equally applicable in this case: the zoning power of municipalities is easily susceptible to being abused for the purpose of denying the constitutional right to the free exercise of religion. Requiring that the zoning authority demonstrate a compelling need to employ its power in these situations would greatly minimize the potential for such abuse.

Respondent finally suggests that this Court's granting of the writ of certiorari would not be consonant with the standards set out in this Court's own rules. However, the standards established in Sup. Ct. Rule 17[9] certainly favor the granting of a writ of certiorari herein. Rule 17.1 provides, *inter alia,* that the following are proper circumstances for the granting of such a writ:

> (a) When a federal court of appeals . . . has decided a federal question in a way in conflict with a state court of last resort;
>
> * * *
>
> (c) When . . . a federal court of appeals has decided an important question of federal law which

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[9] Respondent incorrectly cites the applicable rule as being Rule 19, *see* Resp. Brief, at 20, which is, no doubt, a reference to *former* Rule 19 which, when substantially revised, was redesignated as Rule 17.

> has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. . . .

The decision of the Sixth Circuit is in conflict with the decisions of no less than six state supreme courts, *see* Pet. Brief at 9-10, n.7. Furthermore, as the appellate court herein itself acknowledged, *see* 699 F.2d at 304 (Pet. App. 2a.), this case is one of first impression in the federal courts, and by reason thereof, meets the standard set forth in Sup. Ct. Rule 17.1(c). In fact, it is difficult to imagine a case for which review on certiorari would be more appropriate or necessary. Thus, for all the reasons set forth herein and in its Petition For Writ of Certiorari, the Petitioner urges this Court to grant the writ and review the case at bar.

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